(16,637.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 142.

ROBERT G. WILSON, PLAINTIFF IN ERROR,

vs.

EUREKA CITY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

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a In the Supreme Court of the State of Utah.

EUREKA CITY, Respondent,
v.
R. G. WILSON, Appellant.

Transcript on Appeal.

Filed January 2, 1897.

LILBURN P. PALMER,
Clerk of Supreme Court of Utah.

1 TERRITORY OF UTAH,
County of Juab, Eureka City, } ss:

In the City Justice's Court, Eureka City.

Before Martin Igoe, city justice of the peace *pro tem.*

EUREKA CITY, Plaintiff,
v.
R. G. WILSON, Defendant.

Be it remembered that on this 15th day of May, A. D. 1895, before me, Martin Igoe, city justice of the peace *pro tem.*, city and county aforesaid, personally appeared Gus. J. Heinroid, who was by me sworn in due form of law, and who on his oath did say that R. G. Wilson, on the 14th day of May, 1895, at Eureka city, county of Juab, Territory of Utah, did wilfully, knowingly, and unlawfully move a certain frame building into and upon one of the public streets of said Eureka city, to wit, the county road of Juab county, running through said Eureka city and commonly known as Main street, and did thereby obstruct the free passage of said street and road, said R. G. Wilson not having from the mayor or president of the city council, or any councilor of the common council of said Eureka city, written or any permission to move said frame building into or upon said street, contrary to section 12, ordinance No. 10, Ordinances of Eureka City, Juab County, Utah Territory, entitled "An ordinance adopting the county court survey of streets and naming of same, and providing against the obstruction of streets," passed and approved January 3rd, 1893, in such cases made and provided and against the peace and dignity of the people of Eureka city.

GUS. J. HENROID.

Subscribed and sworn to before me this 15th day of May, 1895.

MARTIN IGOE,
City Justice of the Peace pro Tem.

2 Endorsed: City justice's court. Amended complaint. The People of Eureka City *v.* R. G. Wilson, def't. Filed — 15th,

1895, as amended complaint. Martin Igoe, justice of the peace *pro tem.* No. 3638. Filed in the district court at Provo City, Utah, May 27th, 1895. —— ——, clerk.

STATE OF UTAH, }
County of Juab. }

I, Wm. Button, clerk of the fifth judicial district court in and for Juab county, do hereby certify that the foregoing is a full, true, and correct copy of the amended complaint in the above-entitled action, now on file in my office.

Witness my hand and the seal of said court this 30th day of December, 1896.

WM. BUTTON, *Clerk,*
By T. L. FOOTE,
Deputy Clerk.

[SEAL.]

3 Title of Court and Cause.

Charged with obstructing Main street, in said Eureka. Complaint made by one Gus. J. Henroid, city marshal. Plead not guilty. Judgment, fined $25.00 and costs, taxed at $20.00.

Be it remembered on the 15th day of May, 1895, Gus. J. Henroid filed a complaint accusing R. G. Wilson of the crime of obstructing the street in Eureka city, Juab county, Utah Territory, in violation of section 12 of ordinance No. 10 of the common council of Eureka city aforesaid, approved January 3rd, 1893, and the defendant, having been arrested and brought into court and having had said complaint read and being required to plead thereto, plead not guilty; trial had with jury the 16th day of May, 1895, by jury, with verdict of guilty; and thereupon the court found the defendant guilty and fined the defendant the sum of $25.00 and costs, taxed at $35.60, and ordered and entered judgment against said defendant for the sum of $25.00 and costs, taxed at $35.60; and thereupon defendants files notice, affidavit, and undertaking for appeal, and, the undertaking being approved, appeal is hereby ordered.

JOHN S. WATTS,
City Justice.

I, John S. Watts, hereby certify that I am the duly elected and qualified acting city justice for Eureka city, Juab county, Utah Territory, and that the transcript herein is a true and correct statement, as shown by my docket now in my possession.

JOHN S. WATTS,
City Justice of the Peace.

Judgment entered on the 16th day of May, 1895.

4 Endorsed: "Transcript from city docket. 3638. Filed in the district court at Provo City, Utah, June 3, 1895. —— ——, clerk."

STATE OF UTAH, }
County of Juab, } ss:

I, William Burton, clerk of the fifth judicial district court in and for Juab county, Utah, do hereby certify that the foregoing is a full, true, and correct copy of the transcript from city docket in the above-entitled action now on file in my office.

Witness my hand and the seal of said court this 30th day of December, 1896.

[SEAL.] WILLIAM BURTON, *Clerk,*
By T. L. FOOTE, *Deputy Clerk.*

5 In the District Court of the First Judicial District of the Territory of Utah.

EUREKA CITY, Plaintiff, }
v.
R. G. WILSON, Defendant. }

On appeal from the city justice's court of Eureka city, Juab county, Utah Territory.

Comes now the defendant in the above-entitled cause and, by leave of court first had and obtained, withdraws his former plea of "Not guilty" to the complaint herein and demurs to said complaint, and for cause of demurrer alleges—

That said complaint does not state facts sufficient to constitute an offense.

J. W. N. WHITECOTTON,
Attorney for Defendant.

Endorsed: "3638. Eureka City *v.* R. G. Wilson. Demurrer. Filed in the district court at Provo City, Utah, Oct. 5, 1895. George Havercamp, clerk, by R. B. Thurman, deputy. J. W. N. Whitecotton, att'y for def't."

STATE OF UTAH, }
County of Juab, } ss:

I, William Burton, clerk of the fifth judicial district court in and for Juab county, Utah, do hereby certify that the foregoing is a full, true, and correct copy of the demurrer in the above-entitled action now on file in my office.

Witness my hand and the seal of said court this 30th day of December, 1896.

WM. BURTON, *Clerk.*
By T. L. FOOTE,
Deputy Clerk.

6 First District Court Minutes, Utah, September Term, 1895—Monday, the Ninth Day of September, 1895.

EUREKA CITY
v.
R. G. WILSON.

The hearing of this cause is reset for Sept. 19, 1895.

First District Court Minutes, Utah, September Term, 1895—Thursday, the 19th Day of September, 1895.

The following cases were reset for trial as follows, to wit:
Eureka City *v.* R. G. Wilson, September 26th, 1895.

First District Court Minutes, Utah, September Term, 1895—Friday, the 27th Day of September, 1895.

The following cases were reset for trial as follows, to wit:
Eureka City *v.* R. G. Wilson, Oct. 2d, 1895.

STATE OF UTAH,
County of Utah, } *ss:*

I, E. L. Jones, clerk of the fourth judicial district court in and for Utah county, State of Utah, do hereby certify that the foregoing is a full, true, and correct copy of the minute entries in the above-entitled action as the same appears of record in Minute Book 7 of the First District Court Minutes for Utah Territory now on file in my office, at Provo City, Utah.

Witness my hand and the seal of the fourth judicial district court, at my office, in Provo City, Utah, this 2nd day of November, A. D. 1895.

[SEAL.]

E. L. JONES, *Clerk,*
By R. E. KNOWLDEN,
Deputy Clerk.

7 First District Court Minutes, Utah Co., Utah, September Term, 1897—Monday, the 19 Day of October, 1896.

EUREKA CITY
v.
R. G. WILSON.

In this cause the motion of plaintiff for transfer of this cause to the fifth judicial district court, sitting at Nephi, in Juab county, coming on to be heard, after hearing the statements of counsel for plaintiff, and it satisfactorily appearing to this court that said cause is properly triable in said fifth judicial district, in the county of Juab, therefore ordered that the files, matters, and proceedings in this cause be by the clerk of this court forwarded to the clerk of the fifth judicial district court sitting at Nephi, in said county, State of Utah.

STATE OF UTAH, }
County of Utah, } ss:

I, E. L. Jones, clerk of the fourth judicial district court in and for Utah county, State of Utah, do hereby certify that the foregoing is a full, true, and correct copy of the original order in the above-entitled cause of record and now on file in my office, at Provo City, Utah.

Witness my hand and the seal of said court, at my office, in Provo City, Utah county, Utah, this 20th day of October, A. D. 1896.

[SEAL.]

E. L. JONES, *Clerk,*
By R. E. KNOWLDEN,
Deputy Clerk.

8 Fifth District Court Minutes, Juab County, Utah, October Term, 1896—Saturday, October 24th, 1896. Minute Book "A," page 53.

In the Fifth Judicial District Court of the State of Utah, County of Juab.

EUREKA CITY }
v.
R. G. WILSON. }

This cause came on regularly for hearing, the defendant being present in person with his counsel, J. W. N. Whitecotton, and B. N. C. Scott and George Sutherland appearing as counsel for plaintiff. Both parties, in open court, expressly waive a jury and expressly consent that the same should be tried by the court sitting without a jury. Thereafter evidence was introduced and the cause submitted for the decision of the court, and the court, being sufficiently advised, finds the defendant guilty as charged in the complaint; the defendant thereupon expressly waived time for passing judgment and consent that judgment might be pronounced at once. The court thereupon sentenced the defendant, R. G. Wilson, to pay a fine of $10.00.

Defendant asked for 30 days in which to prepare and file a statement on appeal, also a stay of execution for the same period of time.

It is so ordered by the court.

STATE OF UTAH, }
County of Juab, } ss:

I, William Burton, clerk of the fifth judicial district court in and for Juab county, State of Utah, do hereby certify that the foregoing is a full, true, and correct copy of the minutes of the trial of the above-entitled cause, as appears of record in my office.

Witness my hand and the seal of said court this 29th day of December, 1896.

[SEAL.]

WM. BURTON, *Clerk,*
By T. L. FOOTE,
Deputy Clerk.

9 In the District Court of the Fifth Judicial District of the State of Utah in and for Juab County.

EUREKA CITY, Plaintiff,
v.
R. G. WILSON, Defendant.

This case was commenced by complaint filed in the city justice's court of Eureka city, Utah, on the 15th day of May, 1895. The case was tried, the defendant convicted and adjudged to pay a fine of $25.00 and the costs of the prosecution, from which judgment the defendant appealed to the district court of the first judicial district of the Territory of Utah. In that court the defendant was allowed to withdraw his plea of not guilty and demur to the complaint on the grounds that the complaint did not state facts sufficient to constitute a public offense. This demurrer was by the court overruled on the 5th day of October, 1895; to which the defendant duly excepted.

On the advent of statehood the cause was regularly transferred to the fifth district court for Juab county. The cause came on for trial on the 24th day of October, 1896, both parties in open court expressly waived a jury, and the case was tried before the court, sitting without a jury, and the following proceedings were had:

The defendant objected to the introduction of any testi-
10 mony in the case, on the ground that the complaint does not state facts sufficient to constitute a public offence. Objection overruled; to which the defendant excepted. Section 12 of ordinance number 10 of Eureka city was offered and received in evidence and is as follows:

"No person shall move any building or frame of any building, into or upon any of the public streets, lots or squares of the city, or cause the same to be upon, or otherwise to obstruct the free passage of the streets, without the written permission of the mayor, or president of the city council, or in their absence a councilor. A violation of this section shall on conviction, subject the offender to a fine of not to exceed twenty-five dollars."

To the admission of this section of the ordinance the defendant objected, on the ground that it is immaterial and incompetent, for the reason that the ordinance shows upon its face that it is void; that it is in contravention of section 1 of article XIV of amendments to the Constitution of the United States; that it is void for the further reason that it vests in an individual—the mayor or the president of the city council, or in their absence a member of the city council—an irresponsible and uncontrolled discretion, and delegates or attempts to delegate to such officer or officers a power which the city council has no authority to delegate or exercise. Defendant's objection the court overruled; to which defendant duly excepted.

The following ordinance was also admitted over defendant's objection, to which he duly excepted, to wit:

"An ordinance establishing a fire limit within Eureka city and defining the limits thereof; providing that no wooden building shall be erected within said limits except by permission of the commission on building within the fire limits of said city,
11 and providing for the alteration and repair of wooden buildings already erected."

SECTION 1. That the following boundaries are hereby established as the fire limits of Eureka city, to wit: Commencing at a point on Main street of said city, where said street crosses the Union Pacific Railway track, and opposite or nearly opposite, the Keystone hoisting works, thence running in an easterly direction along said Main street to a point where said street intersects the road or street easterly of the site now occupied by the M. E. Church building; the northerly and southerly boundaries of said fire limits to be two hundred feet on each side of said Main street for said distance.

SECTION 2. Every building hereafter within the fire limits of said city shall be of brick, stone, iron, or other substantial and incombustible material, and only the following wooden buildings shall be allowed to be erected, except as hereinafter provided, viz: Sheds to facilitate the erection of authorized buildings, coal sheds not exceeding ten feet in height, and not to exceed one hundred feet in area, and privies not to exceed thirty feet in area and ten feet in height, and all such sheds and privies shall be separate structures; provided that any person desiring to erect a building of other material than those above specified within said fire limits, shall first apply to the committee on building within said fire limits of the city for permission so to do, and if the consent of the committee on building within said fire limits shall be given, they shall issue a permit, and it shall thereupon be lawful to erect such building under such regulations and restrictions as the committee on building within said fire limits may provide.

12 SECTION 3. Any wooden building already within said fire limits shall only be altered or repaired in such a manner that neither area nor height be increased without the consent of the said committee on building within said fire limits.

SECTION 4. The said committee on building within said fire limits shall have the power to stop the construction of any building, or the making of alterations or repairs on any building where the same is being done in violation of the provisions of this ordinance, and any owner, architect, or builder, or others who may be employed, who shall assist in violation of non-compliance with the provisions of this ordinance shall be subject to a fine for every such violation or non-compliance, of not less than ten nor more than one hundred dollars.

SECTION 5. That there shall be a committee consisting of three members of the council appointed by the mayor and confirmed by the council, to be known as the "committee on building within the fire limits of Eureka city," and that said committee be appointed immediately upon the taking effect of this ordinance.

SECTION 6. This ordinance shall take effect and be in force from and after its first publication in the Tintic Miner.

Passed and approved June 4, 1894.

Attest: JOHN McCHRYSTAL, *Mayor.*

The evidence further showed that on the 15th day of May, 1895, the defendant was the owner and in the control of a certain frame building constructed of lumber and shingles, 20 feet long, 16 feet wide, and 10 feet high to the ceiling, which prior to and at the time it was being moved was occupied as a dwelling-house.

That the defendant applied to the mayor of Eureka city,
13 John McChrystal, for permission to remove this building along and across Main street, which is a principal street in Eureka city; that he stated to the mayor at that time that he desired to remove it from where it was, which was within the fire limits at that time, to another point within the fire limits of Eureka city as defined by the ordinances. The building had been constructed prior to the time of the enactment of the ordinance establishing fire limits and prior to any fire limits being established in Eureka city. The mayor refused to grant permission to move the building, stating that if the defendant desired to remove the building outside of the fire limits he would grant permission to do so, but would not grant permission to move the building along or across said Main street within the fire limits of the city. The distance from the point where the building stood to the point where he desired to move it is 206 feet, along and across Main street. At the point where the building stood originally the street is fifty feet wide from the front of the buildings on the one side to the front of the buildings on the other side, part of that width being occupied by sidewalks on either side of the street and the balance by the travelled highway; that the defendant, immediately after the permission of the mayor was refused him, moved the building from its position into the street with block and tackle, with rollers placed under the building; that the time occupied in moving the building altogether was from eleven o'clock a. m. till 3 or 4 p. m.

That Eureka city is a mining town and was at that time, having a population of about two thousand; that along the street where this building was moved there were business houses or buildings close together upon both sides. The building came upon the street
diagonally, and after it had been gotten upon the street it
14 was moved along by means of a block and tackle and ropes put around a steel bar driven into the street, which was driven in one place in the street. It was admitted by the prosecution that the building was moved by the defendant with reasonable diligence.

At the close of the testimony the defendant moved the court to discharge him on the ground that the facts proved did not show that any offense had been committed, and that the ordinance under which the prosecution is made is invalid; which motion the court overruled; to which ruling the defendant excepted.

The court thereupon found the defendant guilty as charged in the complaint.

The defendant, then being present in court, waiving time for sentence, and being called for sentence, thereupon moved the court to vacate and set aside its decision and to grant a new trial of the cause on the following grounds:

1. That the decision is contrary to the evidence.
2. That the decision of the court is against law.
3. Errors of law occurring at the trial and excepted to by the defendant.

Which motion the court overruled; to which ruling the defendant duly excepted.

The court then proceeded to and did pass sentence upon the defendant that he pay a fine in the sum of ten dollars and costs of the said justice's court and of the said district court.

15 *Specification of Particulars in which the Decision of the Court is Contrary to the Evidence.*

1. The evidence all shows that the defendant was using the street in question for a lawful purpose.
2. The evidence shows that the defendant had done all that was required of him to get permission to use the street, to wit, had requested it of the mayor.
3. The evidence shows that the defendant used reasonable diligence in moving the building, so that the street was not unnecessarily obstructed.
4. The evidence shows that there was no objection made by the mayor to the defendant's using the street, but that he objected only to the destination of the building.
5. The evidence shows that the action of the mayor was such an arbitrary use of power that the defendant was not bound to regard his refusal of permission.

Specifications of Particulars in which said Decision is against Law.

The ordinance No. 10, section 12, upon which the prosecution is based is invalid and cannot support a verdict of guilty nor a judgment thereon for the following reasons:

a. It seeks to delegate to and vest in a single individual, to wit, the mayor or *or* the president of the city council or a single member of the council, a power which can only be exercised by the council itself.

b. The said section of said ordinance is in contravention of section 1 of article XIV of the amendments to the Constitution of the United States.

16 *Specifications of Errors Occurring at the Trial and Excepted to by the Defendant.*

1. The court erred in overruling defendant's demurrer to the complaint.
2. The court erred in overruling defendant's objection to the introduction of any testimony in the case.
3. The court erred in admitting in evidence section 12 of ordinance number 10 of Eureka city, as set out on pages 1 and 2 of this bill of exceptions.
4. The court erred in admitting in evidence ordinance No. 16 of Eureka city, relating to the establishing of fire limits, as set out in this bill of exceptions, pp. 2, 3, and 4.
5. The court erred in overruling defendant's motion to discharge him at the conclusion of the testimony.
6. The court erred in overruling defendant's motion for a new trial.

The foregoing is defendant's bill of exceptions, to be used upon the appeal of the above-entitled cause to the supreme court of the State of Utah.

Dated this 7th day of November, 1896.

J. W. N. WHITECOTTON,
Attorney for Defendant.

Due service admitted this 7th day of November, 1896.

B. N. C. SCOTT,
WILLIAMS, VAN COTT AND SUTHERLAND,
Attorneys for Plaintiff.

It is hereby stipulated that the foregoing bill of exceptions is correct and may now be settled and allowed.

B. N. C. SCOTT,
WILLIAMS, VAN COTT AND SUTH-RLAND,
Attorneys for Plaintiff.

Dated November 10, 1896.

The foregoing bill of exceptions is hereby settled and allowed November 12th, 1896.

E. V. HIGGINS, *Judge.*

17 In the District Court of the Fifth Judicial District of the State of Utah in and for Juab County.

EUREKA CITY, Plaintiff,
v.
R. G. WILSON, Defendant.

To Eureka City, the plaintiff above named, and to B. N. C. Scott and Williams, Van Cott and Sutherland, attorneys for said plaintiff, and to William Burton, clerk of said court:

You will take notice that the defendant in the above-entitled cause hereby appeals to the supreme court of the State of Utah from the order of the said district court of the fifth judicial district overruling defendant's motion for a new trial of said cause and from the judgment of said court in imposing upon the defendant a fine of ten dollars and costs of prosecution in said cause.

Dated December 21, 1896.

J. W. N. WHITECOTTON,
Attorney for Defendant.

Endorsed: Fifth district court, Juab county, Utah. Notice of appeal. Filed Dec. 21, 1896. Wm. Burton, clerk, by T. L. Foote, deputy clerk.

STATE OF UTAH, } ss:
County of Juab, }

I, William Burton, clerk of the fifth judicial district court in and for Juab county, Utah, do hereby certify that the foregoing is a full, true, and correct copy of the notice of appeal in the above-entitled action, now on file in my office.

Witness my hand and seal of said court this 29th day of December, 1896.

WM. BURTON, *Clerk.*
T. L. FOOTE,
Deputy Clerk.

18 In the District Court of the Fifth Judicial District of the State of Utah in and for Juab County.

EUREKA CITY, Plaintiff,
v.
R. G. WILSON, Defendant.

In this cause there is, in my opinion, probable cause for an appeal to the supreme court of the State of Utah.

Dated this 21st day of December, 1896.

E. V. HIGGINS, *Judge.*

19 In the Supreme Court of the State of Utah, Regular January Term, January 19, 1897.

EUREKA CITY, Respondent,
v.
R. G. WILSON, Appellant.

This cause, coming on regularly to be heard, was argued by Mr. J. W. N. Whitecotton in behalf of the appellant, by George Sutherland in reply, was submitted and by the court taken under advisement.

Title of Court and Cause.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged that the judgment of the lower court be, and the same is hereby, affirmed with costs.

20 In the Supreme Court of the State of Utah.

EUREKA CITY, Respondent,
v.
R. G. WILSON, Appellant.

BARTCH, *J.*:

The defendant in this case was originally prosecuted before a justice of the peace, under a municipal ordinance of Eureka city, for the offense of obstructing the free passage of Main street, in said city, by moving into and upon the street a frame building, without having obtained permission as provided by the ordinances.

Upon conviction he appealed to the district court, and, after conviction there and sentence to pay a fine, to this court.

The first question which we will consider is whether we have jurisdiction, on appeal, in a case like this, where the first appeal was from the judgment of a justice of the peace, and where the validity of a city ordinance and not of a statute is assailed.

Counsel for the respondent insist that the decision of the district court in such a case is final and not subject to review here. In support of this contention they cite section 9 of article 8 of the
21 constitution; which section, so far as material here, provides as follows:

"Appeals shall also lie from the final judgment of justices of the peace in civil and criminal cases to the district courts on both questions of law and fact, with such limitations and restrictions as shall be provided by law; and the decision of the district court on such appeals shall be final, except in cases involving the validity or constitutionality of a statute."

This provision grants an appeal from the final judgment of justices of the peace to the district courts, and declares that the decision of those courts on such appeals shall be final, except in cases where the validity or constitutionality of a statute is involved.

The effect of the exception is to allow an appeal to this court in

every case which originates in a justice's court and in which the validity or constitutionality of a statute is drawn in question, made an issue, and decided by the district court on appeal. In all other cases brought before justices of the peace and transferred to the district courts by appeal the final judgment of these courts is conclusive. But does the exception include a case, so brought and transferred, where the validity or constitutionality of a city ordinance was litigated and decided by the district court? We are of the opinion that it does, for, while an ordinance is an enactment of a municipal government and its application is local, still, when valid, it has the force and effect in favor of the municipality and against persons bound thereby of a legislative enactment, and acts done in contravention thereof become unlawful, the same as when done in contravention of a statute.

An ordinance, which can only be passed in pursuance of some legislative enactment, may, like a statute, effect property
22 rights and individual liberty, and the framers of the constitution evidently intended by the use of the word "statute" to include "ordinance," and that the appellate court should have power to determine the validity of any law, whether of local or general application, and whether enacted directly by the law-making power or by a municipality through a delegation of power by the legislature.

While the law-making power of the State is vested in the legislature, yet it is competent for the legislature to delegate power to municipal corporations to pass ordinances which shall have the same force, within the municipality, as a statute, to control its municipal affairs; hence, reasons which exist for the review of statutes by appeal exist for the review of ordinances.

1 Dillon on Mun. Corporations, sec. 308.
18 Am. and Eng. Ency. of Law, 747.
City of Detroit *v.* Railway Co., 95 Mich., 456.
Roderick *v.* Whitson, 51 Hun., 620.
Ex parte Christenson, 85 Cal., 208.

Having concluded that we have jurisdiction to review the question of the validity or constitutionality of an ordinance in a case like the one at bar, it becomes important to inquire whether it is the duty of this court, in this class of cases, to determine questions presented in the record other than those relating to such validity or constitutionality of an ordinance or statute. Counsel for the appellant insists that this court, on appeal, in this class of cases, is not limited to questions of the validity of a statute, but has power to review all the questions presented. We do not agree with counsel as to this proposition, because such does not appear to be the meaning and intention manifested from the provisions of the constitution already quoted, especially when viewed in the light of the
23 history of the former practice in the late Territory of Utah.

Under the territorial form of government, appeals were allowed from all final decisions of the district courts to the supreme court and questions of both law and fact were reviewed, and whether

a case was originally brought before a justice of the peace or in the district court was immaterial.

1 C. L. U., 1888, page 57.

This practice made it possible to appeal any case no matter how insignificant the amount of the judgment or how totally without merit the appeal or the cause of the appellant. It had a tendency to encourage profitless litigation and consume the time of the appellate court without just cause. Such practice was in vogue when the constitution was framed, and we must assume that the framers of that instrument were familiar with current history and that they had knowledge of the practice and its effect.

When, therefore, contrary to the former practice, the framers of the constitution provided that "the decision of the district courts" on appeals from judgments of justices of the peace "shall be final, except in cases involving the validity or constitutionality of a statute," their evident object and intention were to obviate the evil to which the practice then existing was subject, and yet provide a way by which statutory and constitutional questions which might arise in such cases could be reviewed by the appellate court. This object could be but imperfectly attained if, when this court assumed jurisdiction of such a case, it would not only determine the statutory or constitutional question, but also inquire into and determine every other question raised during the progress of the trial.

24 In effect, this would restore the former practice, against the express provision of the constitution, because it would render it possible to bring every such case here for re-examination. All that would be necessary would be to raise *so* some statutory or constitutional question, whether material to the decision of the case or not, and the right of appeal and re-examination of the case would be assured. Clearly no such result was intended, nor is it manifest from the language employed in the provision above quoted; nor can it be made possible by judicial interpretation, without violating familiar rules of construction.

In harmony with the plain meaning and intent of the constitution, we hold: 1. That it is essential to the jurisdiction of this court over judgments of the district courts in cases which originated in and were appealed from justices of the peace that it shall appear that a statutory question was raised and presented to a district court.

2. That such question was decided by the district court, or that its decision was necessary to the judgment rendered in the case.

3. That if these things appear, then this court has jurisdiction and must examine the judgment so far as to enable it to determine whether the statutory question and claim of right were correctly adjudged, and, if they were, the judgment must be affirmed.

4. That if the statutory question was erroneously decided, then this court must further inquire whether, notwithstanding the error in deciding that question, there was any other matter or issue not affected by the statutory question decided, which in itself is sufficient to sustain the judgment, and if such be the case, then the judg-

ment must be affirmed, without determining whether the ad-
25 judication on such other matter or issue be correct.

5. That if it be found that the statutory question is of such force as to render a correct decision thereof necessary to a final adjudication, or that there has been no decision of any other matter or issue not affected by the statutory question sufficient to sustain the judgment of the district court, then this court will reverse the judgment and direct a proper judgment to be entered or remand the cause, as may be required by the circumstances of each particular case.

The application of these principles to the class of cases here under consideration is clearly authorized by the language and spirit of the constitutional provision mentioned.

Murdock *v.* City of Memphis, 20 Wall., 590.

The remaining question necessary to be considered in this case is the one relating to the validity of section 12 of ordinance No. 10 of Eureka city, under which the appellant was convicted. That section reads as follows: "No person shall move any building or frame of any building, into or upon any of the public streets, lots or squares, of the city, or cause the same to be upon, or otherwise to obstruct the free passage of the streets, without the written permission of the mayor, or president of the city council, or in their absence a councilor. A violation of this section shall on conviction subject the offender to a fine of not to exceed twenty-five dollars."

The appellant contends that this is unconstitutional and void, and claims that it is unreasonable and deprives the citizen of a lawful use of a public highway; that it vests in the mayor, or, in his absence, the president or member of the council, an absolute and arbitrary discretion, and delegates to an individual the power which was conferred upon the council, and that it contravenes section 1, article 14, of the amendments to the Constitution of the
26 United States, in that — deprives the citizen of his property without due process of law and denies to him the equal protection of the law. We do not concur in this contention.

The ordinance in question was passed in pursuance of section 1755, C. L. U., 1888, which, among other things, confers power upon the city council "to regulate the use of streets, alleys, avenues," etc., subd. 10; "to prevent and remove obstructions and encroachments upon the same," subd. 11; "to prevent and remove obstructions to any street, avenue, alley," etc., subd. 22.

The city council is thus clothed with power not only to regulate the use of streets, but also to prevent the placing of obstructions upon them. Upon examination of section 12 of the ordinance, it cannot successfully be maintained that its provisions are unreasonable, or that it deprives any citizen of the lawful use of the street, or that it authorizes an improper or unlawful exercise of power or an unjust discrimination, but, on the contrary, its provisions are a substantial compliance with the statute. It is true there is a discretion vested in an officer, but such discretion does not mean an absolute or arbitrary power. It is a legal discretion which must be exercised in a

reasonable manner. Where the law leaves the exercise of a power to the discretion of an officer, it does not mean that he shall exercise such discretion wantonly or arbitrarily, to the injury of any subject. Such officer is responsible for an abuse of the power. The authority or power is not his. He is simply the agent of the law for a lawful purpose and must exercise his discretion fairly, reasonably, and honestly, and is answerable as such for a prostitution of the power so vested in him.

State *v.* Yopp, 2 Am. St. Rep., 305.
White *v.* Kent, 11 Ohio St., 550.
Hamer *v.* Weber County, 11 Utah, 16, 22, 23.

27 In the case at bar the creation of the discretion implies that there may be times and occasions when the moving of a building upon the street might be permitted with safety to property and without any unreasonable interference with the ordinary modes of travel. This, however, is not an ordinary or a usual use of the street, and the appellant could not claim the privilege to so use it, as matter of right. The principal design of a highway is to accommodate public travel in the usual and ordinary mode, and this is so at common law, but it may lawfully be used for other purposes, where the occasion and circumstances permit of such use without an unreasonable interference of the free passage over it of those who are traveling upon it in the usual manner. Just when an unusual or extraordinary use of the highway ought to be permitted is, doubtless, in many instances difficult to determine, especially is this so in cities and towns where the population is dense and the amount of travel great. It would seem impossible to lay down any general rule as to when such use should be allowed, because no such rule could be established which would meet the emergencies of individual cases. Very much must depend upon the locality, the width of the street, the injury, if any, it will be likely to cause to other property, the time when such use of the highway is to be made, and the obstruction it will offer to ordinary travel. No human foresight could, with any degree of accuracy, determine and schedule the occasions and circumstances which would entitle a citizen to use a highway in an extraordinary manner by moving a building into and upon the same. Such being the case, a city council, which has power by statute to regulate the use of the streets and prevent obstructions being placed upon them, may by ordinance prohibit the moving of buildings thereon without the written per-
28 mission of the mayor or other officer or committee of its members, and such power is not legislative, but simply administrative, and renders the prohibition conditional instead of absolute, the use of the highway for such unusual purpose being subject to a contingency, to be declared upon by the agent of the law.

It is doubtless within the power of the city council of Eureka city to entirely prohibit the moving of buildings upon its streets, and where a municipal corporation may prohibit a thing altogether it may prohibit it conditionally, and confer upon some officer or officers power to determine whether a fact or state of things exist which

will authorize the doing of it. In many cases it is difficult to determine whether there has been an unwarranted delegation of discretionary power to an officer, but a delegation of power similar in character to that conferred in the section of the ordinance under consideration has frequently been upheld by the courts, and the views here expressed have the support of authority.

Elliott on Roads and Streets, 578, note 2.
In re Flaherty, 105 Cal., 558.
Day *v.* Green, 4 Cush., 433.
Williams *v.* Citizens' Railway Co., 130 Ind., 71.
Commonwealth *v.* Parks, 155 Mass., 531.
Ex parte Fiske, 72 Cal., 125.
Graves *v.* Shattuck, 69 Am. Dec., 536.
Commonwealth *v.* Davis, 162 Mass., 510.
Pedrick *v.* Bailey, 12 Gray, 161.
Quincy *v.* Kennard, 151 Mass., 563.
People *ex rel. v.* Mullholland, 82 N. Y., 324.
Moers *v.* City of Reading, 21 Pa. St., 188.
Locke's Appeal, 72 Pa. St., 491.
Dowling *v.* Lancashire Ins. Co., 31 L. R. A., 112.
Commonwealth *v.* Ellis, 158 Mass., 555.
Blanding *v.* Burr, 13 Cal., 343.
Lowell *v.* Simpson, 10 Allen, 88.

Nor does section 12 of the ordinance deprive the citizen of his "property without due process of law" or deny to him "the equal protection of the laws," in violation of the 14th amendment
29 of the Constitution of the United States. The provisions of the amendment above referred to undoubtedly mean that there shall be no arbitrary spoliation of property or arbitrary deprivation of individual rights, but that every person shall be afforded equal security and protection with every other person under like circumstances in the enjoyment of his rights of person and property; that all shall have like access to the courts for the protection and enforcement of their personal and civil rights and the redress and prevention of wrongs, and that legislation shall treat alike all persons subject to it, and not interpose an impediment to the business or pursuits of one except as applied to the same business or pursuits of all others under like circumstances. These provisions of the amendment, however, were not designed to interfere with the police power of the State, and while the extent of this power does not appear to have yet been defined with precision, and while practically it would seem impossible to so define it because of the great variety of conditions and circumstances which govern its application, still there can exist no doubt that under such power the State may prescribe regulations to promote the health, peace, education, morals, and good order of the people, and, this being true, it may of necessity by legislation regulate through its agents, with as little inconvenience to the individual as possible, the use of the highways, because such regulations is conducive to the good order of the general public. Especially is this the case as to populous cities

and towns. Laws of this character enacted under the police power of the State are not intended to impose an unnecessary or unusual restriction upon any person or to unjustly discriminate between citizens, but to promote the general good with the least possible inconvenience to the individual.

30 Examining the provisions of the section of the ordinance under consideration, we do not perceive that they contravene any of the principles stated, nor do they authorize any unjust discrimination between citizens in the use of the highway. They apply to all alike under like circumstances and are necessary to the good order of Eureka city, the peace, welfare, and comfort of its inhabitants, simply forbidding an unusual and extraordinary use of the highway by any citizen without first having obtained permission for such use from an officer. There is no attempt to interfere with the usual and ordinary use of the highway, but it is made unlawful for any person to so use his own property as to materially injure the personal rights and property of others. This is in entire harmony with the maxim *Sic utere tuo ut non alienum laedas.*

That a person has the right to move a building into and upon the streets of a city thronged, as they frequently are, with people without any restraint or control is a proposition both unsound and unreasonable. No such right exists at common law, nor is the denial thereof a violation of any statutory or constitutional law.

Barbier *v.* Connolly, 113 U. S., 27.
Crowley *v.* Christiansen, 137 U. S., 86.
Railroad Co. *v.* Richmond, 96 U. S., 521.
Manufacturing Co. *v.* Beckwith, 129 U. S., 26.

The case of Yick Wo *v.* Hopkins, 118 U. S., 356, cited by counsel for the appellant, was one of race discrimination and is not in point here.

The cases relied on by the appellant for a reversal on the ground that the ordinance in question is invalid cannot be regarded as controlling authority in the case at bar. They are principally cases where by ordinance it was attempted to interfere with abso-

31 lute rights of persons and property and with the doing of a thing which might lawfully be done.

As we have seen, such is not the case at bar. We do not deem it important to discuss any other question presented in the record.

The appellant moved his house into and upon Main street, one of the principal streets of Eureka city, without permission, as provided by ordinance, and thereby committed an unlawful act which rendered him liable to the punishment inflicted.

The judgment is affirmed.

We concur.

ZANE, *C. J.*
MINER, *H.*

32 UNITED STATES OF AMERICA, *ss:*

To Eureka City, a municipal corporation, and to Messrs. Williams, Van Cott & Sutherland, its attorneys, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Utah, wherein Robert G. Wilson is plaintiff in error and said Eureka City, a municipal corporation, is defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to each of the parties in that behalf.

Witness the Honorable Charles S. Zane, chief justice of the supreme court of the State of Utah, this 16th day of June, A. D. 1897.

CHARLES S. ZANE,
Chief Justice of the Supreme Court of the State of Utah.

Attest: LILBURN P. PALMER,
Clerk Supreme Court of Utah.

[Seal Supreme Court, State of Utah., Jan. 4, 1896.]

A copy of the foregoing citation was served on us this 16th day of June, A. D. 1897.

WILLIAMS, VAN COTT & SUTHERLAND,
Attorneys for Eureka City, Defendant in Error.

33 In the Supreme Court of the United States.

ROBERT G. WILSON, Defendant and Plaintiff in Error, *vs.* EUREKA CITY, a Municipal Corporation, Plaintiff and Defendant in Error.	Petition for Writ of Error.

And now comes Robert G. Wilson, the plaintiff herein, and respectfully shows to this honorable court:

I. That on the 15th day of May, 1895, a sworn complaint was filed in the justice's court of Eureka city, Utah, charging this plaintiff with the offence of moving a wooden building into and upon a public street of said Eureka city without having the written or any permission from the mayor or president of the city council, or any councilor, so to do, in violation of a certain ordinance of said city which provided as follows:

"No person shall move any building or frame of any building, into or upon any of the public streets, lots or squares, of the city, or cause the same to be upon, or otherwise to obstruct the free passage of the streets, without the written permission of the mayor, or president of the city council, or in their absence, a councilor. A violation of this section shall on conviction subject the offender to a fine of not to exceed twenty-five dollars."

A warrant thereupon duly issued, and this plaintiff, defendant there, was arrested, brought before said justice's court, pleaded not guilty, was tried, found guilty, and adjudged to pay a fine of twenty-five dollars.

From this judgment the plaintiff herein appealed to the district court of the first judicial district of the Territory of Utah,
34 and was afterwards, to wit, on the 19th day of October, 1896, tried in the fifth district court of the State of Utah, found guilty, and adjudged to pay a fine of ten dollars and the costs of prosecution. From this judgment this plaintiff duly appealed to the supreme court of the State of Utah, assigning, among other grounds for reversal of said judgment, that the ordinance under which he was prosecuted was unconstitutional and void, because it is in contravention of section one of article XIV of the amendments to the Constitution of the United States, in this:

1. It deprives the citizen of his property without due process of law.

2. It denies to the citizen the equal protection of the laws.

II. On the 11th day of February, 1896, the supreme court of the State of Utah affirmed the judgment of the district court, and decided that the ordinance in question was valid and not in contravention of the provisions of the Federal Constitution above referred to.

In this judgment of the supreme court of the State of Utah this plaintiff is by his counsel advised and verily believes, and therefore states, that error was committed to his great detriment and injury, which will more fully appear from the assignment of errors which is filed with this petition.

III. In the trial of this cause in the district court and also in the supreme court of the State of Utah there was drawn in question the validity of a statute of and an authority exercised under the State of Utah, on the ground of their being repugnant to the Constitution of the United States in the particulars above set forth and as appears more in detail in the assignment of errors filed herewith, and the decisions were in each instance in favor of their validity.

35 Wherefore this plaintiff prays—

That a writ of error may issue in this behalf to the supreme court of the State of Utah for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in the cause, duly authenticated, may be sent to this the Supreme Court of the United States.

Dated May 28th, 1897.

ROBERT G. WILSON,
Plaintiff in Error and Petitioner,
By J. W. N. WHITECOTTON,
His Attorney.

Attorney's address, Provo City, Utah.

36 In the Supreme Court of the United States.

In the Matter of the Petition of ROBERT G. WILSON for a Writ of Error to the Supreme Court of the State of Utah.

Assignment of Errors.

Comes now Robert G. Wilson, petitioner for a writ of error to the supreme court of the State of Utah, by J. W. N. Whitecotton, his attorney, and says that the said supreme court of the State of Utah in rendering its decision and judgment in this cause erred in the following particulars, to wit:

I. The said court erred in upholding the validity of the following ordinance of Eureka city, to wit: "No person shall move any building or frame of any building, into or upon any of the public streets, lots, or squares, of the city or cause the same to be upon, or otherwise to obstruct the free passage of the streets, without the written permission of the mayor, or president of the city council, or in their absence a councilor. A violation of this section shall on conviction subject the offender to a fine of not to exceed twenty-five dollars," for the reason:

1. That thereby the citizen is deprived of his property without due process of law.

2. The citizen is thereby denied the equal protection of the laws. This ordinance is therefore repugnant to section one of article XIV of amendments to the Constitution of the United States and therefore void.

37 II. The said court erred in affirming the judgment of the district court in said cause, for the reason that by the acts of the plaintiff herein, defendant there, complained of he did not violate any law, and said judgment is without any authority of law.

J. W. N. WHITECOTTON,
Attorney for Plaintiff in Error, Provo City, Utah.

38 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Utah, before you or some of you, being the highest court of law of the said State in which a decision could be had in the said cause, between Eureka City, a municipal corporation, and Robert G. Wilson, wherein was drawn in question the validity of a statute and ordinance of and an authority exercised under said State, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their validity, a manifest error hath happened, to the great damage of the said Robert G. Wilson, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all

things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

39 Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 28th day of May, in the year of our Lord one thousand eight hundred and ninety-seven.

[Seal United States District Court, District of Utah.]

JERROLD R. LETCHER,
Clerk U. S. Circuit Court, District Utah.

Allowed by—
C. S. ZANE,
Chief Justice Supreme Court State of Utah.

40 In the Supreme Court of the State of Utah.

ROBERT G. WILSON, Plaintiff in Error,
v.
EUREKA CITY, Defendant in Error.

Know all men by these presents that we, H. Bamberger, Alex. I. Wyatt, and E. W. Duncan, of the city of Salt Lake, county of Salt Lake, State of Utah, are held and firmly bound unto the above-named Eureka city in the sum of five hundred dollars, to be paid to the said Eureka city; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the — day of May, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas the above-named Robert G. Wilson has sued out a writ of error from the Supreme Court of the United States to the supreme court of the State of Utah to reverse the judgment of the said supreme court of the State of Utah in the above-entitled cause: Now, therefore, the condition os this obligation is such that if the above-named Robert G. Wilson shall prosecute said writ of error to effect and answer all damages and costs if he fail to make said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

HERMAN BAMBERGER. [L. S.]
ALEX. I. WYATT. [L. S.]
E. W. DUNCAN. [L. S.]

Signed and delivered and taken and acknowledged this 3rd day of June, 1897, before me—
J. W. N. WHITECOTTON.

Approved:
C. S. ZANE,
Chief Justice Utah.

41 UNITED STATES OF AMERICA.

STATE OF UTAH, }
County of Salt Lake, } ss:

I, Lilburn P. Palmer, clerk of the supreme court of Utah, in pursuance to a writ of error allowed in the case wherein R. G. Wilson is plaintiff in error and Eureka City is defendant in error, do return attached hereto a transcript of the record and proceedings, opinion, bond, together with the original citation, writ of error, and assignment of errors, all in and of said court and cause, to the Supreme Court of the United States, and I hereby certify that said attached transcript of said record and proceedings, opinion, and bond is a full, true, and complete copy of the several originals thereof on file or of record in my office.

In witness whereof I hereunto set my hand and affix the seal of the supreme court of the State of Utah this 14th day of July, 1897.

[Seal Supreme Court, State of Utah, Jan. 4, 1896.]

LILBURN P. PALMER,
Clerk Supreme Court of Utah.

Endorsed on cover: Case No. 16,637. Utah supreme court. Term No., 142. Robert G. Wilson, plaintiff in error, *vs.* Eureka City. Filed July 23d, 1897.

No. 142.

FILED
DEC 27 1898
JAMES H. McKENNEY,
Clerk.

Brf. of Whitecotton for D. E.

SUPREME COURT

Filed Dec. 27, 1898.

THE UNITED STATES,

OCTOBER TERM, 1898.

No. 142.

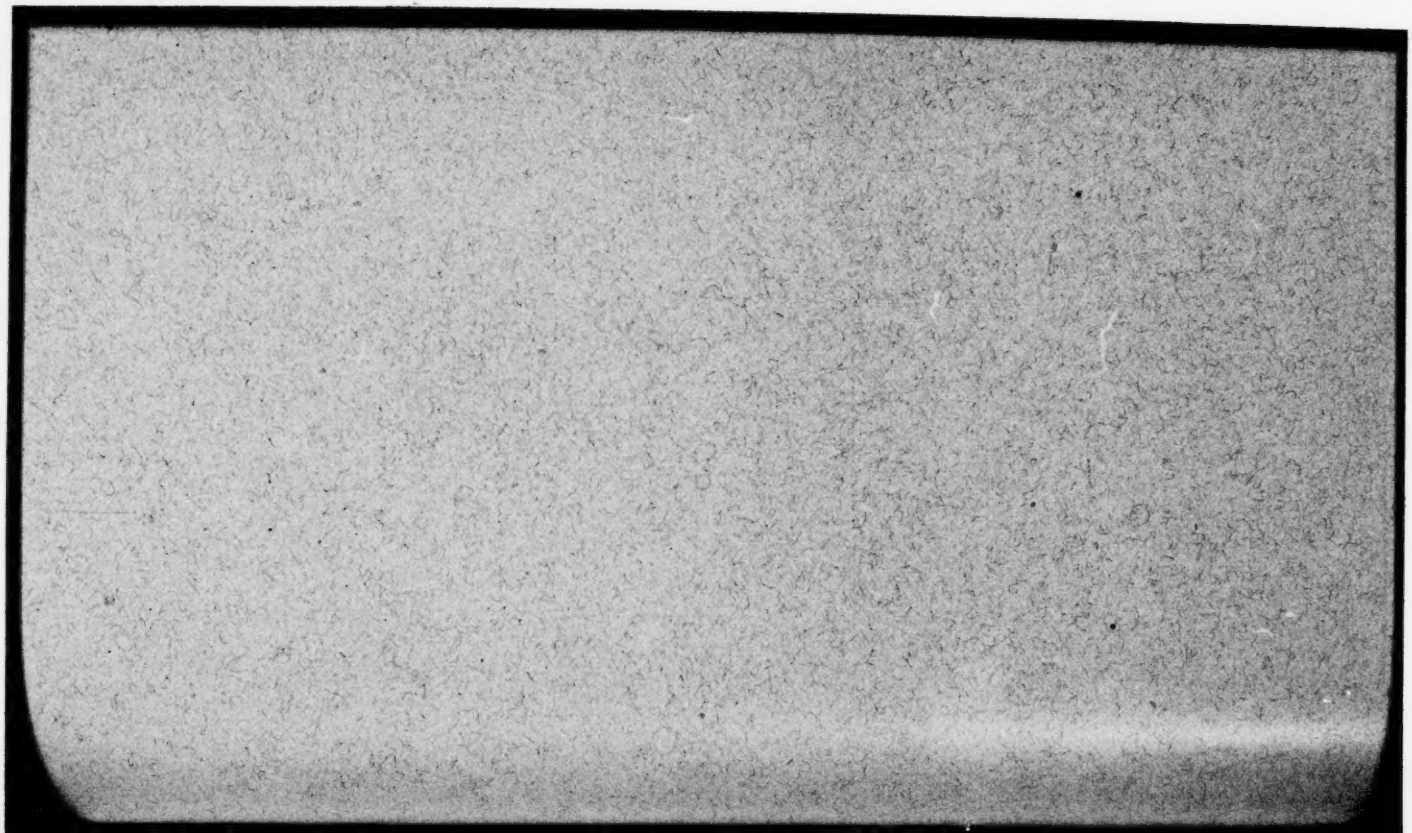
ROBERT G. WILSON,
Plaintiff in Error,
vs.
EUREKA CITY,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

Brief and Argument for Plaintiff in Error.

J. W. N. WHITECOTTON,
Attorney for Plaintiff in Error.

THE SKELTON CO., PUBLISHERS, PROVO, UTAH.—1898.



SUPREME COURT

OF

THE UNITED STATES,

OCTOBER TERM, 1898.

No. 142.

ROBERT G. WILSON,
Plaintiff in Error,

vs.

EUREKA CITY,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

Brief and Argument for Plaintiff in Error.

This case was commenced by filing a complaint in the Justice's Court of Eureka City on the 15th day of May, 1895, charging the defendant there, with having, on the 14th day of that month, wilfully, knowingly, and unlawfully moved a certain frame building into and upon one of the public streets

of Eureka City, to-wit: the Main street, and thereby obstructing the free passage of said street, without having from the Mayor, or president of the City Council, or any councilor of the common council of said city, written or any permission so to do, contrary to section 12, of Ordinance No. 10, of said city.

To this complaint, the defendant entered his plea of "not guilty," proceeded to trial, was found guilty and adjudged to pay a fine of $25.00, from which judgment he appealed to the district court of the First Judicial District of the Territory of Utah, where, by leave of court, he withdrew his former plea and demurred to the complaint on the ground that it did not state facts sufficient to constitute an offense. His demurrer having been overruled, and his exception noted, he was subsequently, to-wit: on the the 24th day of October, 1896, tried in the Fifth District Court of the State of Utah, in Juab County. During this trial, section 12 of Ordinance No. 10 of Eureka City, was received in evidence against defendant's objection, to which he duly excepted. The said section reads as follows: "No person shall move any building or frame of any building, into or upon any of the public streets, lots or squares of the city, or cause the same to be upon, or otherwise to obstruct the free passage of the streets, without the written permission of the Mayor or president of the City Council, or in their absence a councilor. A violation of this section shall, on conviction, subject the offender to a fine of not to exceed twenty-five dollars." At this trial the defendant was found guilty, and sentenced to pay a fine of ten dollars. From the judgment of the district court he appealed to the State Supreme Court.

and there insisted that the district court had erred in convicting the defendant under the said ordinance, for the reason that the said ordinance was void, because in contravention of section 1 of Article XIV, of the Amendments to the Constitution of the United States, in that it deprives the citizen of his property and liberty without due process of law; and that it denies to the citizens, and particularly to the defendant, the equal protection of the laws. Upon these matters the said State Supreme Court fully passed, as appears by their opinion, pages 12 to 28, of the printed record herein, and decided them adversely to the defendant, and upheld the validity of the ordinance. It is to review that judgment, that the plaintiff in error has brought his case to this court. Eureka City has no special charter, but was incorporated under the general incorporation act, approved March 8, 1888, and the particular section of the ordinance in this case, is based upon subdivisions 10 and 11, of section 1755, Compiled Laws of Utah, 1888, enumerating powers of city councils, which read as follows:

"10. To regulate the use of streets, alleys, avenues, sidewalks, cross walks, parks and public grounds.

"11. To prevent and remove obstructions and encroachments upon the same.

These powers are given to *the City Council*, and the plaintiff in error claims that the City Council cannot delegate them to the Mayor, the president of the council, a councilor, or any one else, but that it must use the powers, if at all, as a council.

The facts of the transaction out of which the prosecution grew, as they appear on page eight of the record, are

as follows: On the 15th day of May, 1895, the plaintiff in error, was the owner, and in the control, of a frame building twenty feet long, sixteen feet wide, and ten feet high, which up to that time had been occupied as a dwelling-house.

That on that day, he applied to the Mayor of the City for permission to move the building along and across Main Street, which is a principal street in Eureka City; that he stated to the Mayor at the time, that he desired to move it from where it was, which was within the fire limits, at that time, to another point within the fire limits, as defined by the ordinances. The building had been constructed prior to the time of the enactment of the ordinance establishing fire limits, and prior to any fire limits being established in Eureka City.

The Mayor refused to grant permission to move the building, stating, that if the plaintiff in error desired to remove the building outside of the fire limits, he would grant permission to do so, but would not grant permission to move the building along or across Main Street within the fire limits of the city. The distance from the point where the building stood to the point where he desired to move it is 200 feet, along and across Main Street. At the point where the building stood originally the street is fifty feet wide from the front of the buildings on the one side to the front of the buildings on the other side, part of that width being occupied by sidewalks on either side of the street; and the balance by the traveled highway; that the plaintiff in error, immediately after the permission of the Mayor was refused him, moved the building from its position into the street

with block and tackle; with rollers placed under the building; that the time occupied in moving the building altogether was from eleven o'clock a. m. till 3 or 4 p. m.

That Eureka City is a mining town and was at that time having a population of about two thousand; that along the street, where the building was moved, there were business houses or buildings close together on both sides. The building came upon the street diagonally, and after it had been gotten upon the street, it was moved along by means of block and tackle and ropes put around a steel bar driven into the street, which was driven in one place in the street. It was admitted by the prosecution that the building was moved by the defendant with reasonable diligence.

From these facts it appears that the Mayor did not rest his refusal to grant permission upon any inconvenience that might be caused to any one by Wilson's desired use of the street, but upon another ground wholly unconnected with the use of the streets. Having had the streets of the town given to him, he unceremoniously assumes to himself the powers belonging to the council, of regulating the erection or removal of buildings within the fire limits. With equal propriety he might have refused his consent on the ground that the plaintiff in error desired to use the building for a blacksmith shop or a Sunday school.

The plaintiff in error contends that this ordinance is void, becauses it places the rights of the citizens to use the streets for certain purposes, admitted by the ordinance to be proper and lawful, in case the Mayor or president of the City Council shall so decide, in the hands of an individual, who is bound by no rules to do justice in any case submitted to him.

By the Charter, the power to regulate the use of the streets is given to the City Council. That council, without any authority so to do, delegates that regulation to the Mayor. They do not prescribe any rules by complying with which the citizens shall all stand upon an equal footing and have and enjoy equal privileges. The *Lord* Mayor does not suggest that the use of the street asked for would in any, the least, degree, interfere with the ordinary travel thereon, nor offer any suggestion having any relevancy to the question, why he should not hear the prayer of Wilson. He said, if the applicant desired to move the building outside the fire limits, he would grant him permission to do so. This kind of municipal legislation did not first appear in Eureka City. Other City Councils had tried it before. Grand Rapids, Michigan, enacted an ordinance of which the first section was as follows: "No person or persons, association or organizations, shall march, parade, ride or drive in or upon or through the public streets of the city of Grand Rapids, with musical instruments, banners, flags, torches, flambeaux, or while singing or shouting, without having first obtained the consent of the Mayor or Common Council of said city; funeral and military processions, however, shall not be subject to the foregoing provisions of this section; but such processions, as well as those having the permit or consent of the Mayor or Common Council, when using the public streets of said city, shall conform to such directions as the Mayor or Chief of Police may give in relation to the streets to be used, and the portion thereof to be occupied by them, and in relation to the manner of such use."

Section five of the same ordinance provided for the

punishment of offenders against the first section.

By the charter of that city, among other powers granted to the Common Council were the following:

"2. To prevent the cumbering of streets, sidewalks, etc., in any manner whatever.

"3. To control, prescribe and regulate the manner in which the 'highways, streets, avenues, lanes, alleys, public grounds and spaces within said city shall be used."

In the case of *Frazee* who was prosecuted for a violation of that ordinance, the Supreme Court of Michigan,

Matter of Frazee, 63 Mich. 396,

(S. C. 6 Am. St. Rep. 310),

in construing the ordinance under the Charter power of the city said: "If the legislature of the state had the power to subject the people of cities to the uncontrolled and arbitrary will of a common council, and having such power, had clearly signified their purpose to do so, then it might perhaps be claimed, with some show of reason, that the city of Grand Rapids could do what it pleased under these grants of power. But the rules of legal construction allow no such absurdity. It is not in the power of the legislature to deprive any of the people of the enjoyment of equal privileges under the law, or to give cities any tyrannical powers. All Charters and all laws and regulations, to be valid for any purpose, must be capable of construction, and must be construed in conformity to constitutional principles, and in harmony with the general laws of the land; and any by-law which violates any of the recognized principles of legal and equal rights is necessarily void so far as it does so, and void entirely if it

cannot be reasonably applied according to its terms." And farther on in the same opinion (page 317, 6, Am. St. Rep.) "Whatever regulation is made must operate uniformly, under the same conditions. It is competent to hold all persons liable for any actual wrong done which creates dangerous or noxious consequences. That is already provided for under the law of nuisances. These processions might, no doubt, become nuisances, as others might do, but it cannot be assumed that they will; and it appears in the record before us, that they have been judicially adjudged otherwise when prosecuted. Any doctrine that would hold them legally objectionable in themselves would cover every military or political or society procession that ever assumed respectable proportions. All by-laws made to regulate them must fix the conditions expressly and intelligibly, and not leave them to the caprice of any one. This doctrine, as applied to public officers, was recognized in *Horn vs. People*, 26 Mich, 221. It is quite as applicable to the Common Council, acting by resolution on particular cases. The law must be impartial and general, or it is no law. It is only where power is given to license that permissive action can be left to particular cases. If this were allowed in the case of processions, it would enable a mayor or council to shut off processions of those, whose notions did not suit their views or tastes in politics or religion, or any other matter on which men differ. When men in authority have arbitrary power, there can be no liberty."

The same question, practically, arose in the case of State Ex. Rel. Garrabad vs. Dering, 84 Wis. 585. (S. C. 36 Am. St. Rep. 948).

In construing the ordinance the court said:

"It is susceptible of being applied to offensive and improper uses, made subversive of the rights of private citizens and it interferes with and abridges their privileges and immunities, and denies them the equal protection of the laws in the exercise and enjoyment of their undoubted rights. In the exercise of the public power, the common council may, in its discretion, regulate the exercise of such rights in a reasonable manner, but cannot suppress them, directly or indirectly, by attempting to commit the power of doing so to the Mayor or any other officer. The discretion with which the council is vested is a legal discretion, to be exercised within the limits of the law, and not a discretion to transcend it or to confer upon any city officer an arbitrary authority making him in its exercise a petty tyrant. Such ordinances or regulations, to be valid, must have an equal and uniform application to all persons, societies or organizations similarly circumstanced and not be susceptible of unjust discriminations, which may be arbitrarily practiced to the hurt, prejudice, or annoyance of any."

A similar ordinance was declared void by the Supreme Court of Kansas in the case of

Anderson vs. City of Wellington, 40 Kan. 173.

(S. C. 10 Am. St. Rep. 175.)

In the opinion in that case, the court said: "It is not a reasonable regulation to vest the power arbitrarily in the mayor to grant or refuse permission to any association of persons combined for legal and meritorious purposes to

parade the streets with music." And also: "All by-laws made to regulate parades must fix the conditions upon which all persons or associations can move upon the streets expressly and intelligently; such conditions operating on all of the same class alike, and being reasonable in their requirements, and not oppressive in their operation, and must not give the power of permitting or restraining processions to an unregulated official discretion, and thus allow an officer to prevent those with whom he does not agree on controverted questions from calling public attention to the principles of their party or the objects of their organization in one of the most effectual methods known to associated effort.

The city of Baltimore had an ordinance, which, among other things, contained the following: "That no person should erect, build, or have put up any steam saw mill or machinery or any steam engine for any purpose whatever, or planing machine, or machinery within the limits of the city, without first obtaining the sanction of the Mayor and City Council." And another section as follows: "All permits granted for steam boilers and steam engines and boilers may be revoked, and the same shall be removed after six months notice, from the Mayor, and any one receiving such notice, who shall refuse or neglect to conform to the requirements of the same, shall pay a fine not exceeding one hundred dollars, etc." In passing upon the question of the validity of that ordinance, the Supreme Court of Maryland held it void, in the case of

Mayor, etc., of Baltimore vs. Radecke, 49, Md. 217.

(S. C. 33 Am. Rep. 239).

In the opinion the following language occurs: "It"

(the ordinance) "does not profess to prescribe regulations for their construction, location or use, nor require such precautions and safeguards to be provided by those who own and use them as are best calculated to render them less dangerous to life and property, nor does it restrain their use in box factories and other similar establishments within certain defined limits, nor in any other way attempt to promote their safety and security without destroying their usefulness. But it commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam engine in the prosecution of any business in the city of Baltimore to cease to do so, and by providing compulsory fines for every day's disobedience of such notice and order of removal, renders his power over the use of steam in that city practically absolute, so that he may prohibit its use altogether. But if he should not choose to do this, but only to act in particular cases, there is nothing in the ordinance to guide or control his action. It lays down no rules by which its impartial execution can be secured, or partiality or oppression prevented. It is clear that giving and enforcing these notices may, and quite likely will, bring ruin to the business of those against whom they are directed, while others from whom they are withheld may be actually benefited by what is thus done to their neighbors, and when we remember that this action or non-action may proceed from enmity or prejudice, from partizan zeal or animosity, from favoritism and other improper influences and motives easy of concealment and difficult to be detected and exposed, it becomes unnecessary to suggest or to comment upon the injustice capable of being wrought under cover of such a

power, for that becomes apparent to every one who gives to the subject a moments consideration. In fact, an ordinance, which clothes a single individual with such power, hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void. Resting our decision as to the validity of this ordinance on this ground, we shall not consider the question whether it is also void as an unauthorized delegation of a public power or trust."

The city of Chicago had an ordinance, the first section of which was as follows: "That no parades or processions shall be allowed upon the streets of the city, nor shall any open air meeting be held upon any ground abutting upon any street or avenue of the city, until a permit therefor shall be first obtained from the police department, under a penalty of not less than $25, nor more than $100. Such permits shall be issued without fee by the superintendent of police, and shall, in case of parades and precessions, specify the route to be followed upon the streets of the city." In declaring this ordinance void, in the case of

City of Chicago vs. Trotter 136 Ills. 430.

The Supreme Court of Illinois said:

"The ordinance in question seems to recognize the fact that all processions are not to be repressed, and seems to proceed upon the theory that some of such demonstrations are to be allowed and permitted, and others prevented. It does not however, fix and determine the conditions under which parades and processions will be unlawful. It merely leaves it to the discretion or caprice of the superintendent of police to imperatively prescribe who shall be permitted to gather together in such processions, and who shall not; to dictate

that the members of one political party, or of one religious denomination, or of one civic society, may, and the members of another political party, religious denomination or civic society may not, have such parades or processions, and to arbitrarily fix the times, occasions and localities when and where such assemblages will be allowed. Under the ordinance, the superintendent of police has even authority to prohibit all street parades and processions whatsoever. It is subversive of the liberty of the citizen, and outside of the domain of the law, that authority so arbitrary should be lodged in one individual. The powers that were granted by the State, and that are relied upon by the municipality, were delegated to the City Council, and that body could not transfer its legislative prerogatives, and the public trust which was imposed upon it, to a mere elective officer."

It seems clear that this language will apply with equal force to the case at bar. The Eureka ordinance leaves no doubt that it may be lawful sometimes, in some parts of the city, under some circumstances, to use the streets for what may be conceded to be an uncommon use, but certainly not an idle, vicious, or unnecessary use. By passing this act the City Council admitted that such a use of the streets might become necessary for the occommodation of the citizens, and they thereby recognized both the necessity and the propriety of such use. Having then created, or recognized and acknowledged this legal right in the citizens to use the public streets for such a purpose, why should they then place this right in the hands of an individual who might withhold it from one person arbitrarily, and dispense

it to another in precisely the same situation in all respects? By the terms of this act, the Mayor is governed by no rules imposed by the law-making power; he is responsible to no one for an abuse of his power; and there is no way provided by which his decision can be questioned or appealed from. He is supreme in his sphere, and truly monarch of all the streets, that any body surveys, in Eureka City. To the man who played "heeler" to elect him to his throne the latchstring may be out, while no one who happened to be in a different political combine need apply for these privileges, which are given to the Mayor for distribution to his favorites. These rights are the people's and no set of city councilmen can withdraw them from the people and give them to a petty tyrant to use as small change.

With characteristic legal acumen the learned Supreme Court of Utah, in their opinion in this case, at the bottom of page 15 of the printed record, say: "It is true there is a discretion vested in an officer, but such discretion does not mean an absolute or arbitrary power. It is a legal discretion which must be exercised in a reasonable manner. Where the law leaves the exercise of a power to the discretion of an officer, it does not mean that he shall exercise such discretion wantonly or arbitrarily, to the injury of any subject. Such officer is responsible for an abuse of the power. The authority or power is not his." Now I have no doubt but that language expresses what the Utah Supreme Court thought about this controversy. But what has that to do with the *constitutional law* of the case? Perhaps, at some time, the same learned court may suggest what Wilson could have done when the Mayor of Eureka refused to

give him permission to move his building, by way of redressing his wrongs. Suppose Wilson had mandamused him to compel him to grant permission, would he not have been answered in the language of this court in the case of Yick Wo vs. Hopkins 118, U. S. 356, where they said, at page 366, "So that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of *mandamus*, to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent, without reason and without responsibility. The power given to them is not confided to their discretion in the legal sense of the term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint?" That appears to have been precisely the attitude of the Mayor in this case. No reason offered why the street should not be used; only an objection to the distination of the building. No hint that it was a busy day on the street, such as an unusual number of people or vehicles or traffic on the street. Was Wilson bound to pay any attention to this little tyrant? What free man would have done less than he did? What claim has one, who would do less, to the name of a *man*. It will not do to say he ought to have obeyed the ordinance and looked to the law for redress. If the ordinance is valid, there is no redress, because the government by law is at an end, and chaos reigns obedient only to the whims and

caprices of little mayors. It is true, Wilson could have licked the hand that smote him, and left his building standing where it was. Suppose every man in that town for some reason sufficient to himself, had concluded to move his building, and the Mayor had peremptorily refused permission to every one. Could a more complete tyranny and abuse of power be imagined? And yet that would have been equal and exact (*in*) justice to all under the powers given to the Mayor by this ordinance. Suppose again, that he had given the permission to every one who had voted for him, and withheld it from all who had opposed his election. Where can any one find room for complaint under that ordinance? It gives him the power without any restraint or rules of any kind, and leaves him to exercise it according to his own sweet will. The learned Supreme Court of Utah say near the end of their opinion, "The case of Yick Wo vs. Hopkins 118 U. S. 356, was one of race discrimination and is not in point here." The truth is, that very few decisions of the United States Supreme Court exactly square with the Utah Supreme Court's views of the law.

We wish now to call attention to that case of

Yick Wo vs Hopkins 118 U. S. 356.

That was a case arising under an ordinance of the City of San Francisco, of which section 68 was as follows: "It shall be unlawful, from and after the passage of this order, for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco without first obtaining the consent of the Board of Supervisors, except the same be located in a build-

ing constructed either of brick or stone." It is true the plain intent of this ordinance was to discriminate against the Chinese, but it is the *form* of the ordinance that makes that discrimination *possible.* And the form is the same as that of the ordinance involved in this case. It would seem that a white citizen should be entitled to the same protection under the Federal Constitution as a Chinaman, under like circumstances. In deciding that this ordinance was unconstitutional, this court,speaking by Mr. Justice Matthews said:

"It" (the ordinance) "does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows without restriction the use for such purposes of buildings of brick or stone; but, as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure. And both classes are alike only in this, that they are tenants at will, under the supervisors, of their means of living." And farther, beginning at the bottom of page 369: "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they

do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by the means of the suffrage. But the fundamental right to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law, which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth may be a government of laws and not of men. For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." Again, at page 371: "The same principle has been more freely extended to the quasi-legislative acts of inferior municipal bodies, in respect to which it is an ancient jurisdiction of judicial tribunals to pronounce upon the reasonablenss and consequent validity of their by-

laws. In respect to these, it was the doctrine, that every by-law must be reasonable, not inconsistent with the Charter of the Corporation, nor with any statute of parliament, nor with the general principles of the common law of the land, particularly those having relation to the liberty of the subject or the rights of private property." Although we have the solemn adjudication of the Supreme Court of Utah, that the opinion from which the foregoing quotations are made, is not in point upon the issue at bar, we must still confess our inability to understand why it is not. Were the Chinamen's or any other laundrymen's interests or rights any more completely in the hands and power of the board of supervisors, than Wilson's right to use the street of Eureka City for a certain confessedly lawful purpose was in the hands and power of the Mayor? One would almost think that before our State Supreme Court can see the application of Constitutional principles, they must be able to see a Chinamen's "queue", or smell dirty clothes.

We submit, that a people's necessities make their rights, when uses of streets and highways are in question. It is no greater obstruction to a street to move such a building as Wilson's was upon it, than to pile building materials in the streets while constructing buildings upon abutting property. Speaking of this subject Mr. Dillon in his work on Municipal Corporations Sec. 730 says: "We have heretofore shown that the primary purpose of a street is for passage and travel, and that unauthorized and illegal obstructions to its free use come within the legal notion of a nuisance. But it is not every obstruction, irrespective of its character or purpose, that is illegal, even although not sanc-

tioned by any express legislative or municipal authority. On the contrary, ~~the~~ *the right of the public to the free and unobstructed use of a street or way is subject to reasonable and necessary limitations and restrictions.* The carriage and delivery of fuel, grain, goods, etc., are legitimate uses of a street, and may result in a temporary obstruction of the right of public transit. So the improvement of the street or public highway itself may occasion impediments to its uninterrupted use by the public. And so of the improvements of the adjoining lots, by digging cellars, by building, etc.; this may occasion a reasonable necessity for using a part of the street or sidewalk for the deposit of material. Temporary obstructions of this kind are not invasions of the public easement, but simply incidents to or limitations of it. They can be justified when, and only so long as they are, reasonably necessary. There need be no *absolute* necessity; it suffices that the necessity is a *reasonable* one. But this will never justify the leaving of the street or way in an unsafe and dangerous condition, or its use in an unreasonable manner or for an unreasonable time." The Supreme Court of New Hampshire in the case of

Graves vs. Shattuck, 35 N. H. 257.

(S. C. 69 Am. Dec. 536.)

held that moving buildings on suitable streets, with expedition and care, is permissible. Measured by these rules, it can hardly be maintained that Wilson was not making a reasonable use of the street, when he moved a frame building 20 by 16 feet a distance of 206 feet in four or five hours time, especially, when it is remembered that there is no

pretense in the testimony that any single person or any interest whatever was inconvenienced.

The opinion of the court in the case of

Eureka City vs. Wilson, 15 Utah, 67,

contains some strange language, when considered in connection with that employed in the case at bar. At page 72 the court in passing upon the validity of another ordinance said: "Section one of the ordinance in question in this case defines the fire limits of Eureka City. Section two, above quoted, in conformity with the statutes, prescribes the kind of material to be used in the construction of buildings within the fire limits, which shall be brick, stone, iron, or other incombustible material. It also prescribes that certain classes of buildings, giving particular descriptions of the same, may be constructed with combustible material within such limits. Then follows a proviso wherein the Committee on Building is empowered, on application therefor by any person, to grant permission to erect any building with combustible material, under such regulations and restrictions, as that committee may provide. All the provisions of section 2 not contained in the proviso appear to be authorized by the statute, and to conform to the principles hereinbefore stated, respecting ordinances. By adding the proviso, however, the Council has attempted to confer upon a committee, not only an absolute power, which would enable it to defeat the very object of the ordinance at its mere will and pleasure, but also a legislative power, which would enable it to perform a duty imposed upon the Council itself by the statute, and that is to provide regulations and restrictions to control the grant-

ing of permission according to the provisions of the ordinance. This the Council had no power to do. The erection of a wooden building in any part of the city is not in itself unlawful. It only becomes so when forbidden by law, within the fire limits, for the security of persons and property, and the promotion of the interests and good order of the city; and while a City Council in this state may prohibit, by ordinance, the construction of buildings, within fire limits, of combustible material, still it cannot confer a power upon a committee, such as is attempted to be conferred by the proviso, which may be used as a means for unjust and arbitrary discrimination between citizens. If this proviso were valid, then, no matter what regulations and restrictions the committee might adopt, it would still be within its power to grant permission to one person to erect a wooden building and refuse the privilege to another under the same circumstances. The statute vested in the Council the exercise of powers of legislation respecting the establishing of fire limits and the construction of buildings therein. This demands a discretion in the Council itself, and cannot be delegated. The proviso cannot be justified as a reasonable exercise of the authority conferred by the statute, and is void." Of course we would not like to ask the court to consider any decision of the Supreme Court of Utah as authority, because our oath as an attorney forbids that we wilfully seek to mislead the Court, but the language just quoted resembles very much in spirit that used by this Court in the case of Yick Wo vs Hopkins. Perhaps the fact that the ordinance which the Utah Court was then considering was in some way connected with *fire*, and that *fire* is used in *washing*, enabled

them to see some similarity between that case and the Chinese wooden laundry case.

The City of East St. Louis had an ordinance which delegated to the Treasurer of the city the power to determine the amount that each applicant for a license to keep a dram shop should pay—not less than $50 for six months. This ordinance was enacted under a charter which contained the following language: "The City Council shall have power to restrain, prohibit and suppress tippling-houses, dram-shops, gaming, bawdy, and other disorderly houses." In construing the ordinance under the charter, the Supreme Court of Illinois in the case of

City of East St. Louis vs. Wehrung, 50 Ill. p. 31

said: "This provision manifestly intended that the power should be exercised by the City Council, under reasonable and proper ordinances, and not that they should authorize an individual to grant or refuse a license, or to fix the amount which should be paid for a license. If the treasurer may, under this ordinance, refuse license with the concurrence of the Mayor, then they, and not the City Council, would regulate or suppress dram-shops; and if the treasurer may, in his discretion, fix the sum to be paid, then he, and not the City Council, would discharge the duty. In the proper exercise of this power, the City Council should adopt general ordinances, prescribing a general rule by which licenses may be obtained. They might, no doubt, prescribe the character of persons who might, or might not obtain licenses; or they might, in their regular or called meetings, in such manner as they might ordain, grant

such licenses. The ordinances should prescribe the amount required to be paid for each license, either by an ordinance relating to the entire city, or grade the rates by divisions or portions of the city, or otherwise. The ordinance should be of that general character that all persons coming within its requirements should be entitled, by complying with its provisions, to receive a license. And the amount to be paid should be determined by ordinance or order of the council, and not left within the discretion of a single officer of the city. It is, however contended, that appellee was liable to the forfeiture, notwithstanding the ordinances are unwarranted, inasmuch as the city, by section 8, declares that any person who shall engage in the trade or business of selling liquor contrary to the ordinance shall be subject to a fine for each offense. There is, no doubt, power conferred upon the city to prohibit the sale of such liquors within the limits of the city; but it is obvious that such was not the purpose of the ordinance, as the authorities, on the contrary, endeavored to provide the means by which such traffic might be carried on in the city. It then follows, that the Common Council have neither prohibited the sale of spirits without a license, nor have they regulated its sale; nor has the city charter rendered it penal to sell liquors without a license. Hence the city has no right to recover a penalty, until they shall, by proper ordinance under their charter, either prohibit the sale of liquor, or regulate its sale by an ordinance free from objection, and fix a penalty for a violation of such ordinance." The court accordingly held the ordinance void.

To the same effect is the case of

Bryan vs. City of Chicago, 60 Ills. 507, and

Kinmundy vs. Mahan et al. 72 Id. 463.

Hydes and Goose vs. Joyes 4 Bush 464.

(S. C. 96 Am. Dec. 311).

Thompson vs. Schermerhorn 6 N. Y. 92.

Davis vs. Read et al. 65 Id. 566.

Birdsall vs. Clark et al. 73 Id, 73.

Lyon vs. Jerome, 26 Wend. 484.

The Supreme Judicial Court of Massachusetts held in the case of

Day vs. Green et al. 4 Cash. 433.

That where a by-law of a city prohibits the moving of buildings through the public streets, without a license granted by the Mayor and Aldermen, the board of Aldermen cannot delegate to the Mayor alone the power to grant such licenses. That the Mayor of a city, who, under the authority of an order of the board of Aldermen, which they had no power to pass, has granted a license for the moving of a building through the streets, is not estopped, in an action of trespass against him, for moving the building out of the street, where it has been left by the owner in the course of such removal, to set up the invalidity of the license. In the opinion, the Court, speaking by Chief Justice Shaw, uses the following language, at 438: "But the question of law is, whether the Mayor alone had authority to grant such license. It appears by the case, that after the passage of the by-law, the City Council, the Mayor and Aldermen, in May, 1847, passed a

vote, authorizing the Mayor to grant licenses for the removal of buildings, in all cases, in which he might deem it expedient, under the regulations and upon the conditions prescribed by the city ordinance. The Court are of the opinion, that the authority thus vested in the board, organized and acting together as an administrative body, could not be delegated by them to a single member, although the constitutional head of such board, to be exercised according to his views of expediency. By the organization of city governments in this commonwealth, Aldermen are elected with a view to their judgment and experience, their knowledge of what is just to the individual, and necessary to public safety and convenience. When, therefore, such a power is granted to the Mayor and Aldermen, constituted as they are, to act as one deliberative and administrative body, confidence is reposed in their united wisdom and experience, in deciding both upon the fitness of granting a license, dependent upon the local position, the width of the streets, the magnitude of the building, the season of the year, and all similar circumstances and in prescribing the conditions necessary to the public safety and convenience."

We confess our inability to see any difference between the principles involved in that case and the case at bar. The order of the Mayor and Aldermen conferring the power of licensing upon the Mayor alone was declared void and therefore no one could rely upon it. Here, the attempt of the City Council to confer a power, which the Charter vested in them as a council—a deliberative and administrative body—upon a single individual, the Mayor or president of the Council or a Councilor, was also a nullity and no one

was bound to pay any attention to it. While it is possibly true, that, under the Charter, the City Council *might* have absolutely prohibited the use of the streets contended for by the plaintiff in error, it is clearly apparent that they never intended to do so, and in the language of the Supreme Court of Ills., in the case of City of E. St. Louis vs. Wehrung, 50 Ills. at page 32, "The power conferred on the City in reference to this subject has not been properly exercised, and, until it shall be, it remains dormant, subject to be called into active exercise whenever the city shall see proper to act in the manner authorized by their Charter." See also the paragraph of that decision immediately preceding the language above quoted.

That powers vested in Common Council may not be by it delegated to others, see

City of Oakland vs. Carpenter et al 13 Cal. 540.

Zabel vs. Louisville Baptist Orphans' Home 13 L. R. A. 668 (Ky.)

McCrowell vs. Bristol 20 L. R. A. 653 (Va.) and note.

State vs. Kantler 21 N. W. Rep. 857. (Minn.)

People vs. Haug 37 N. W. Rep. 21 (Mich.)

Minneapolis Gas Light Co. vs. Minneapolis 30 Id. 450 (Minn.)

City of St. Louis vs. Russell 20 L. R. A. 721 (Mo.) and note.

I. Dillon's Municipal Corporations (Fourth Ed.) Sec. 96.

Cooley's Const. Lim. (Fifth Ed.) 249.

From the record in this case it will be readily seen,

that the amount of money involved can be but a small item in the controversy. The importance of the question whether that small amount can be *lawfully* taken from the citizen under the facts and circumstances of this case must be our only apology for trespassing upon the time of this court. The plaintiff respectfully submits, that unless prohibited by positive law, he had a right to use the street of the city for the purpose for which he used it. That the attempt to legislate upon the subject, made by the City Council, was absolutely void, because it committed to the mere will and caprice of a single person, with no rules to guide his actions, and no responsibility to any earthly power, the powers of local government which had been by law vested in them as a body. That by the exercise of this arbitrary power in a tyrannical manner, the Mayor sought to deprive him of a right to the use and enjoyment of his property, not unreasonable, nor in violation of the rights of other people, without due process of law, and that he was thereby denied the equal protection of the law. He claims that under the great charter of our liberties he has protection against such acts of one man power. His contention has been denied at every step along the way, and now he knocks at the door of the last tribunal that can hear his plea, and, if here he can get no relief, he must, and will, bow reverently to the last voice that speaks upon our constitutional liberties.

Respectfully Submitted,

J. W. M. Whitecotton

Attorney for Plaintiff in Error.

No. 142.

Brief of Williams for D. C.

Office Supreme Court U. S.
FILED
JAN 4 1899
JAMES H. MCKENNEY
Clerk.

BRIEF FOR DEFENDANT IN ERROR.

Filed Jan. 4, 1899.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

NO. 142.

Robert G. Wilson, Plaintiff in Error,

vs.

Eureka City, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

FILED.

(16,637.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

NO. 142.

ROBERT G. WILSON, PLAINTIFF IN ERROR,
vs.
EUREKA CITY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

BRIEF FOR DEFENDANT IN ERROR.

The plaintiff in error was convicted in the District Court of Juab County, State of Utah, of a violation of an ordinance of Eureka City, which reads as follows:

"No person shall move any building or frame of any building into or upon any of the public streets, lots or squares of the City or cause the same to be upon or other-

wise to obstruct the free passing of the streets, without the written permission of the Mayor or President of the City Council or, in their absence, a councilor. A violation of this section shall on conviction, subject the offender to a fine of not to exceed $25.00."

It is claimed by the plaintiff in error that this ordinance is invalid, because thereby the citizen is deprived of his property without due process of law and is denied the equal protection of the laws and that the ordinance is repugnant to Section 1 of Article XIV of the amendments to the Constitution of the United States and therefore void. The charter power of the City is as follows: To regulate the use of streets, alleys, avenues, sidewalks, cross-walks, parks and public grounds (1 Comp. Laws Utah, 1888, p. 621, Subd. 10). To prevent and remove any obstructions and encroachments on the same (subd. 11). To regulate and prohibit the throwing and depositing of ashes, etc., and prevent injury or obstruction to any street, avenue, alley, park or public ground (id. p. 623, subd. 22),

I.

THE STREETS OF THE CITY ARE PRIMARILY UNDER THE CONTROL OF THE LEGISLATURE. THERE IS NO PROOF THAT PLAINTIFF IN ERROR HAD ANY SPECIAL RIGHT THEREIN. THE USE OF A STREET FOR MOVING A HOUSE IS NOT AN ORDINARY USE AND UNLESS EXCEPTIONAL CIRCUM-

STANCES APPEAR SUCH USE WOULD BE A NUISANCE AT COMMON LAW.

The defendant complains that by the ordinance in question he is forbidden to exercise a natural and ordinary right; that permission having been refused by the Mayor, he would have a natural right to move his house upon the street in question. There is no evidence in the record that it was usual or customary to use the street in question for the purpose of moving houses. In the absence of any ordinance and in the absence of such proof the authorities seem to be to the effect that to move a house upon a street in a city is a nuisance which may be abated summarily or by application to a Court of Equity.

In Williams v. Citizens Railway Co. (Ind.) 30 Am. St. Rep. 205, it appeared that the defendant was attempting to move a house along Main Street in the City of Elkhart, and was interfering with the operation of the street railway belonging to the appellee. An action was brought to restrain the moving of the house and an injunction issued. Upon the appeal the Supreme Court of Indiana said:

> "The appellants in this case are not asking to be allowed to make an ordinary use of the streets of the city; they are, on the contrary, asking that they be permitted to use the streets in an extraordinary mode and for an unusual purpose." (Citing authorities.) "That the demand in this case is an extraordinary one is shown by the authorities to which we have here referred; but it may be made more plain by simply saying that the purpose for which highways are laid out and dedicated is that of travel in the usual

> modes. It would be strange indeed if large buildings could be moved along the streets of a city without control or restriction, and it would be equally strange if the owner of a building could destroy the property of others in order to enable him to move his building from one place to another."

In the case of Day v. Green, et al, 4 Cush. 433, the Supreme Judicial Court of Massachusetts uses this language:

> "That it is often useful and convenient that buildings should be so removed is found by experience. It may often be done with little or no inconvenience to the public under suitable and proper restrictions adapted to each particular case and therefore *it seems highly proper that the power to authorize and regulate it should exist somewhere.* (Our italics). Perhaps the power vested in municipal corporations to make salutary by-laws for the regulation of the highways is sufficient for this purpose."

In Graves v. Shattuck (N. H.) 69 Am. Dec. 536, the Supreme Court of New Hampshire said:

> "If public highways in Nashua and similar localities had been commonly used for the purpose of moving buildings the plaintiff was guilty of no nuisance in moving his building through them, provided he selected suitable streets, used proper expedition and was in the reasonable use of such streets under all the circumstances shown in evidence, causing no unnecessary obstruction therein."

It would seem therefore that in the absence of any ordinance on the subject, it would be necessary for the defendant to show that it was usual and customary to use streets of the City in question for the purpose of moving houses before he could claim any such right.

II.

THERE WAS AMPLE GROUND FOR THE REFUSAL TO GRANT THE PERMISSION IN THIS PARTICULAR CASE.

The defendant expressly declared to the Mayor in applying for permission that he expected to violate another ordinance of the City, viz. that with reference to the fire limits. The building in question was a frame building and was to be set up within the fire limits. The ordinance forbade the erection of this character of buildings within the fire limits. That the removal of a building from one place to another within the fire limits is within such prohibition see Wadley v. Gilman, 12 Me. 403.

Eureka City v. Wilson, 15 Utah, 67, 76.

III.

THE ORDINANCE IN QUESTION IS VALID BOTH UNDER THE EXPRESS POWER CONFERRED UPON THE CITY AND AS AN EXERCISE OF ITS GENERAL POLICE POWER.

Under the provisions of the Compiled Laws of Utah, 1888, already quoted, it will be seen that the City has the power to regulate the use of streets and to prevent injury, obstructions and encroachments to and upon them. The extent of the power having been defined, the municipality is the sole judge of the manner in which it shall be exercised.

State vs. Yopp, 2 Am. St Rep., 305.

White vs. Kent, 11 O. St., 550.

It would seem to require no argument to show that an ordinance which forbids the moving of houses upon the streets of a city is not only valid but highly necessary. Under the authority conferred by the legislature upon the council to regulate the use of streets, to prevent obstructions and encroachments upon them, the council is given plenary power.

Wood vs. Mears, (Ind.) 74 Am. Dec., 222.

It may prohibit the running of hogs upon the streets.

Roberts vs. Ogle, 83 Am. Dec., 201.

It may forbid the beating of drums upon the streets without a special permit from the president of the board of trustees.

In re Flaherty, 105 Cal., 558.

In the case of Commonwealth vs. Curtis, 9 Allen, 266, it was held that an ordinance prohibiting swine going upon any sidewalk in the city so as to interfere with the convenient use of the same was within the power of the city under the general welfare clause.

In the case of Pedrick vs. Bailey, 12 Gray, 161, it was held that an ordinance providing that no person should maintain an awning before his door without the consent of the mayor and aldermen constituting a part of the city council, was within the power of the city.

In Commonwealth vs Plaisted, 2 L. R. A., 142, it was held that a rule of the Boston Board of Police prohibiting any person playing a musical instrument in the streets or public places in the city except in certain

cases, unless licensed by the board of police was within the power of the city.

In the case of Commonwealth vs. Abrahams, 156 Mass., 57, the ordinance prohibited the making of orations in the public parks of Boston without the prior consent of the board of park commissioners. The secretary of the Central Labor Union requested permission to hold a public meeting in Franklin Park on July 4th. Permission was not given. Defendant did make a brief oration in a portion of the park in which no considerable number of the people were gathered; no shrubbery or ornamental trees were ruined; his subject was the right of citizens to assemble peaceably and to debate social questions. The oration was delivered in an ordinary oratorical tone and was applauded by hand clapping at the close. The audience quietly dispersed and no injury was done the park. Defendant was found guilty and appealed. The Supreme Court said:

> "The parks of Boston are designated for the use of the public generally and whether any park or a part of any park can be temporarily set aside for the use of a portion of the public is for the park commissioners to decide in the exercise of their discretion."

In the case of Day vs. Green, supra, the Court held that where an ordinance of the City of Cambridge prohibited the removal of buildings in the streets except by license granted by the mayor and aldermen, it was unlawful for any person to move a building in the streets of the city upon the license of the mayor alone.

There was a query in the case as to whether or not the corporation could authorize the temporary total obstruction of the highway. The court suggests that it might be highly proper that the power to authorize and regulate it should exist somewhere.

In the case of Lowell vs. Simpson, 10 Allen, 88, an ordinance probibited the obstruction of any street for the purpose of building, without obtaining written license from the mayor and aldermen, or some person authorized by them. The court held that the mayor alone had no authority to grant the license, and that any agreement made in consideration of the mayor's license alone, to indemnify the city against damages, was without consideration and void.

IV.

THE POWER CONFERRED ON THE MAYOR IS NOT A DELEGATION OF LEGISLATIVE POWER BUT IS ONE OF ADMINISTRATIVE POWER AND SHOULD BE UPHELD.

The distinction between what may and what may not be delegated by a governing body to its agencies is very well settled. Nothing is more common than to leave a discretion to an officer or agent of a municipality.

A very usual ordinance is to prohibit carrying concealed weapons without the permission of the mayor. Such ordinances are upheld, although they vest in the mayor power to set aside the prohibition in individual cases.

In the case of Downing v. Insurance Co., (Wis.) 31 L.

R. A., 112 at page 124, the authorities are reviewed, and quoting from Moers. vs. Reading, 21 Pa. 202, it is said:

> "Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the occasion exists for executing it; but it cannot be said that the exercise of such discretion is the making of the law."

And quoting from Locke's appeal, 72 Pa., 491, 498, it is said:

> "The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend.

See also Field vs. Clark, 143 U. S. 69, where this Court held that the power conferred on the President of the United States by the McKinley bill to suspend the free introduction of certain articles from certain countries unless a reciprocity treaty should be made was not an unlawful delegation of power. The power conferred upon the mayor by the ordinance in question is wholly administrative and not legislative.

The ordinance declares that buildings shall not be moved upon the streets of the City, but in the administration of this statute it was recognized that occasions might arise where individual hardship would result without corresponding benefit to the public and in such cases a discretion is vested in the mayor to suspend the operation of the law. Such provisions are upheld we believe by the great weight of authority.

V.

THE ORDINANCE IS NOT INVALID IN CONFERRING POWER ON THE MAYOR TO GRANT PERMISSION TO MOVE BUILDINGS UPON THE STREETS, BECAUSE WHAT MAY BE FORBIDDEN ABSOLUTELY MAY BE FORBIDDEN CONDITIONALLY.

In Davis vs. Mass. 167 U. S. 43, 48, this Court, in determining a similar question, said:

> "The right to absolutely exclude all right to use necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser."

See also the following cases:

In re Flaherty, 105 Cal. 558.

Commonwealth vs. Parks, 155 Mass. 532.

Commonwealth vs. Ellis, 158 Mass. 555.

Quincy vs. Kennard, 151 Mass. 563.

Commonwealth vs. Davis, 162 Mass. 510.

Lowell vs. Simpson, 10 Allen, 88.

Day vs. Green, 4 Cush. 433.

Commonwealth vs. Abrahams, 156 Mass. 57.

Easton vs. Covey, (Md.) 22 At. Rep. 266.

Pedrick vs. Bailey, 12 Gray, 161.

Welch vs. Hotchkiss, 12 Am. Rep. 383.

Child vs. Bemus, 12 L. R. A. 57.

VI.

THE ORDINANCE IN QUESTION IS NOT IN CONFLICT WITH THE FIRST SECTION OF THE

XIVTH AMENDMENT TO THE FEDERAL CONSTITUTION OR OF ANY OTHER PROVISION OF THE CONSTITUTION.

If the power to forbid the moving of houses upon the streets of a city either absolutely or conditionally is within the police power of the State of Utah, as we understand the decision of this Court, the question as to whether or not the plaintiff in error has been deprived of any right under the federal constitution must be answered in the negative.

In the case of Davis vs. Mass., supra, this Court, passing upon a question identical in principle with that presented here, said:

> "It is, therefore, conclusively determined there was no right in the plaintiff in error to use the common, except in such mode and subject to such regulations as the legislature in its wisdom may have deemed proper to prescribe. The XIVth. amendment to the Constitution of the United States does not destroy the power of the States to enact police regulations as to the subjects within their control. (Citing authorities). And does not have the effect of creating a particular and personal right in the citizen to use public property in defiance of the Constitution and laws of the State."

In Minneapolis Railway Co. vs. Beckwith, 129 U. S., 29, this Court said:

> "But the clause does not limit nor was it designed to limit the subjects upon which the police power of the State may be exerted. The State can now, as before, prescribe regulations for the health, good order and safety of society and adopt such measures as will advance its interests and prosperity."

In Barbier vs. Connolly, 113 U. S., 31, this language is used.

> "But neither the amendment—broad and comprehensive as it is—nor any other amendment was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity."

In Jones vs. Brim, 165 U. S. 180, this Court, after holding that the clause of the 14th amendment in question was intended to prohibit an arbitrary deprivation of life or liberty or arbitrary spoliation of property, said:

> "But it does not limit, nor was it designed to limit, the subjects upon which the police power of a state may be lawfully exerted."

Most of the cases which will be relied upon by counsel for defendant are cases which are readily distinguishable from the one at bar. The point of distinction is this: In those cases the ordinance undertook to forbid the doing, without permission, of things which were not only generally lawful in themselves, but were absolute rights. In this case the ordinance forbids the doing of a thing which may or may not be lawful, but permits the mayor to set aside the prohibition in individual cases. The council have the right under the charter power to forbid absolutely the moving of buildings upon the streets. If the ordinance had been passed without the qualification, then the defendant in this case under no condition could have moved the

building in question. How is he injured, or how is any citizen injured or deprived of any right, if in addition to being forbidden to move a building the possibility is presented to him and to any other citizen of having the prohibition removed in any particular case?

A large number of the cases relied upon grew out of the attempt to interfere with the parades of the Salvation Army.

It was held and we think rightfully, that this was class legislation; at any rate those cases are clearly distinguishable from the case at bar. Ordinances similar to the one in question have been repeatedly upheld by the Courts. The vesting of a discretion in an officer to grant permits is valid; what may be forbidden absolutely may be conditionally.

We refer the court to a few of the decided cases which are most directly in point.

In the case of Flaherty, 105 Cal. 558 an ordinance forbade the beating of drums in the traveled streets of the city without the permission of the president of the board of trustees. The ordinance was held valid by a majority of the court. Numerous authorities are cited in that case and we invite the court's special attention to it.

The court said:

> "It is contended that the clause authorizing a permit is partial and oppressive because it gives too much power to the president of the board, and is violative of general constitutional principles against abridging the privileges of citizens, depriving a person of his

rights without due process of law, denying him the equal protection of the law, etc.

"The continuous and daily beating of drums on the streets of a city would be an intolerable nuisance, endangering the safety of teams and the occupants of vehicles drawn by animals, as well as of pedestrians liable to be injured by runaways; and stunning the ears with din so constant as to be almost insufferable. On the other hand, there is usually no objection to such noises on a few occasions, either when there are patriotic celebrations generally participated in by all the people, or processions of a part of the people united in civic societies, political parties, etc. These occasions are comparatively few and usually well known, so that the people are prepared for them; and the processions and drums are generally preceeded by policemen who give notice of the approaching uproar. But how can these occasions be provided for? By an ordinance which shall anticipate and state in detail before-hand every occasion on which the noises may be made? Such a thing is practically impossible. No human being could conjure up all the circumstances under which the people might want a band (with a drum) on the streets. It would not do to name legal holidays alone; that, for obvious reasons, would be too narrow a provision. Neither would it do to single out, in addition to holidays, certain enumerated days, as for instance, the first Monday in every month; the President of the United States or some other distinguished man whose advent should be celebrated with drums might come on Tuesday. Neither would it be possible to schedule the kinds or characters of occasions of which drums would be a necessary part, and so the practical result of petitioner's contention is that all persons must be allowed to beat drums on all occasions as they may choose, or no person must be allowed to beat a drum on any occasion whatever.

"In dealing with this and similar questions, such as repairs

> of wooden buildings within fire limits, carrying concealed weapons, using public buildings and grounds, ringing bells on buildings where many operatives are employed, haranguing on the streets by lecturers, preachers, etc., singing or playing on musical instruments on the streets, and the like—our federal, state and municipal governments have always recognized the practical impossibility of providing in advance for proper exceptional cases, and the necessity of giving to a public officer some discretion in the premises; and laws and ordinances based on that principle have nearly always been upheld when subjected to judicial test. Laws are not made upon the theory of total depravity of those who are elected to administer them; and the presumption is that municipal officers will not use these small powers villianously and for purposes of oppression and mischief. Of course it is impossible to state in terms the extent or the limitation of what is known as the police power; and courts have not attempted to do it. Whether or not that power has been exceeded in particular cases must be determined as the cases arise; and, to find the law applicable to a particular case, we must look to see what courts have held in similar cases. And we find that statutes and ordinances similar in character to the one in question in the case at bar have been sustained in most of the cases to which our attention has been called."

The Court then proceeds to cite and discuss numerous cases, some of which we refer to and upon all of which we rely.

The cases which will be relied upon by appellant here, were before the Court in this case. See Brief for Petitioner, p. 558-9.

In Ex parte Fiske, 72 Cal. 125, the ordinance provided that no wooden building could be erected within

the fire limits without permission in writing signed by a majority of the fire wardens, etc. The California Court held that it was valid. Discussing the question here involved, at page 127, the Court said:

> "And it is equally clear that no general rule could be established before hand that would meet the emergencies of individual cases. Therefore, the power to give relief in particular instances is conferred on certain officers, and it is not to be presumed that they will exercise it wantonly or for purposes of profit or oppression. Neither is the granting of permits in particular instances to be considered as a taking away of any rights from those to whom such permissions are not given. The latter would be in no better position if such permits were given to none or if there was no power to give them at all."

In this case the authorities are reviewed and the case of Yick Wo vs. Hopkins, 118 U. S. 356, which is relied upon by appellant, is distinguished from the ordinance in question. We invite the especial attention of the Court to this case. Also in the case of Crowley vs. Christensen, 137 U. S., page 86, the distinction contended for is pointed out, and the case of Yick Wo vs. Hopkins is distinguished.

Commenting upon that case, this Court says:

> "It will thus be seen that that case was essentially different from the one now under consideration, the ordinance there held invalid vesting uncontroled discretion in the board of supervisors with reference to a business harmless in itself and useful to the community; and the discretion appearing to have been exercised for the express purpose of depriving the petitioner of a privilege that was extended to others. In the present case the business is not one that any person is permitted to carry on without a license but

> one that may be entirely prohibited or subjected to such restrictions as the governing authority of the city may prescribe."

In Commissioners of Easton vs. Covey, (Md.) 22 At. Rep., 266, an ordinance forbidding the erection of buildings without the permission of the commissioners through their clerk was held valid.

In Welch vs. Hotchkiss, (Conn.) 12 Am. Rep., 383, where the municipality had been authorized by its charter to make by-laws regulating the erection of buildings, a by-law requiring a permit and payment of license fee before erecting a building, was held to be valid.

In the case of State vs. Tenant, 28 Am. St. Rep. 715, the distinction contended for is very clearly pointed out by the Court, and it is held that the legislature may restrict an individual in the exercise of dominion or control over his own house and premises AS MAY RESULT IN INJURY TO OTHERS, provided the law does not upon its face discriminate in favor of one person or class, and the legislature may delegate such power to municipal corporations, but that this cannot be done where the right of dominion of an individual which he might otherwise exercise without question, is restricted.

Referring to the case of State vs. Yopp, the Court says, at page 719:

> "While the legislature has no right to enact a law forbidding all men in a certain section from building houses of any kind on their own land, it unquestionably is empowered to forbid riding bicycles on a particular road or street altogether, because the lives of other

> persons and the safety of the property of others are imperiled by their use, on account of the danger of frightening horses attached to vehicles. *Sic utere tuo ut non alienum laedas.* Having power to prohibit using bicycles on the road entirely, the legislature had the power to authorize a person or tribunal to grant a license, when the road should be clear of vehicles, that it has to provide for the licensing the sale of spirituous liquors."

This points out the distinction in very clear and emphatic terms.

In the case of Pedrich et al. vs. Bailey et al., 12 Gray, 161, an ordinance providing that no person should maintain an awning before his door without the consent of the mayor and aldermen, was held valid.

In Commonwealth vs. Parks, 155 Mass. 532, the Court says, with reference to an ordinance prohibiting blasting in the city without the written consent of the aldermen who were only a part of the city council:

> "Furthermore, what the municipal body may forbid altogether, it may forbid conditionally unless this written permission is obtained before hand; nor do we think it matters that the permission required is that of the alderman and not of the whole city council."

In Quincy vs. Kennard, 151 Mass, 563, an ordinance forbade keeping swine within the town without a permit in writing from the board of health. The court held it valid, saying:

> "It is admitted that the board of health had authority to forbid the exercise of the employment of keeping swine in the town of Quincy, but is argued that the order passed was invalid because the prohibition contained in it was qualified by the words 'without a permit in writing first obtained from the board of health.' We are at a loss to see how it affects the validity of the

> order that the board expressly reserved to themselves the power to do what they could have done even if the prohibition had been absolute, or how the defendants are put in a worse position by the order contemplating the possibility that the board of health may grant them a written permit, than if it had excluded that possibility."

In Commonwealth v. Ellis, 158 Mass., 555, where an order forbade selling in the street any goods except on a permit from the superintendent of streets, the ordinance was held reasonable, constitutional and valid; the Court said:

> "We are of opinion, both on principle and authority, that the city council may lawfully forbid public selling in the streets. (Citing numerous cases.) This being so, the ordinance is none the worse for the exception in case of permit from the superintendent of streets." (Citation of authorities.)

In Commonwealth v. Davis, 162 Mass., 510, where an ordinance forbiding the making of a public address without a permit from the mayor, was held valid, the Court said:

> "It is settled also that the prohibition in such an ordinance which would be binding if absolute, is not made invalid by the fact that it may be removed in a particular case by a license from a city officer or a less numerous body than the one which enacts the prohibition."

And this holding of the Supreme Court of Massachusetts is followed by this Court in the case already referred to, 167 U. S. p. 43.

In the case of State v. Yopp (N. C.) 2 Am. St. Rep. 305, the Court held the law providing that bicycles

should not be used upon certain roads without the permission of the superintendent of the road, valid, saying:

> "It is further objected that the statute leaves it to the arbitrary discretion of the superintendent of the road named to allow or disallow persons to use 'a bicycle, tricycle or other non-horse vehicle,' on it. This is a misapprehension of the true import of the provision cited. The discretion vested in the superintendent is not arbitrary. He is made the agent of the law, as well as superintendent, and he is bound to exercise the discretion vested in him honestly, fairly, reasonably, and without prejudice or partiality, for the just purpose of effectuating the intention of the statute * * * * The authority is not his; he is simply made the agent of the law for a lawful purpose, and he is amenable as such for any prostitution of the power so vested in him, and the creation of the discretion implies that there may be occasions or times or seasons when bicycles may be used on the road."

We also refer to the following cases:

Commonwealth vs. Abrahams, Supra;

18 Am. & Eng. Ency. Law, page 747;

96 U. S., 529.

Lowell vs. Simpson, Supra;

Tate vs. Greenboro, (N. C.) 24 L. R. A., 671;

Rodwick vs. Wheeler, 51 Hun., 620;

State vs. White, 64 N. H., 48;

People vs. Mulholland, 82 N. Y., 324.

It is therefore submitted that the decision of the Supreme Court of Utah should be affirmed.

P. L. WILLIAMS,

ATTORNEY FOR DEFENDANT IN ERROR.

WILSON *v.* EUREKA CITY.

ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

No. 142. Submitted January 17, 1899. — Decided February 20, 1899.

Section 12 of ordinance No. 10, of Eureka City, providing that "No person shall move any building or frame of any building, into or upon any of the public streets, lots or squares of the city, or cause the same to be upon, or otherwise to obstruct the free passage of the streets, without the written permission of the mayor, or president of the city council, or in their absence a councillor. A violation of this section shall on conviction, subject the offender to a fine of not to exceed twenty-five dollars," is not in conflict with the provisions of the Constitution of the United States.

SECTION 12 of ordinance number 10 of Eureka City, Utah, provided as follows:

"No person shall move any building or frame of any building, into or upon any of the public streets, lots or squares of the city, or cause the same to be upon, or otherwise to obstruct the free passage of the streets, without the written permission of the mayor, or president of the city council, or in their absence a councillor. A violation of this section shall on conviction, subject the offender to a fine of not to exceed twenty-five dollars."

The plaintiff in error was tried for a violation of the ordinance in the justice's court of the city. He was convicted and

sentenced to pay a fine of twenty-five dollars. He appealed to the district court of the first judicial district of the Territory of Utah.

On the admission of Utah into the Union the case was transferred to the fifth district court of Juab County, and there tried on the 24th of October, 1896, by the court without a jury, by consent of the parties.

Section 12, *supra*, was offered and admitted in evidence. Plaintiff in error objected to it on the ground that it was repugnant to section 1 of article 14 of the Constitution of the United States, in that it delegated an authority to the mayor of the city, or in his absence to a councillor.

There was also introduced in evidence an ordinance establishing fire limits within the city, providing that no wooden buildings should be erected within such limits except by the permission of the committee on building, and providing further for the alteration and repair of wooden buildings already erected. The ordinance is inserted in the margin.[1]

[1] SECTION 1. That the following boundaries are hereby established as the fire limits of Eureka City, to wit: Commencing at a point on Main street of said city, where said street crosses the Union Pacific Railway track, and opposite or nearly opposite, the Keystone hoisting works, thence running in an easterly direction along said Main street to a point where said street intersects the road or street easterly of the site now occupied by the M. E. Church building; the northerly and southerly boundaries of said fire limits to be two hundred feet on each side of said Main street for said distance.

SEC. 2. Every building hereafter within the fire limits of said city shall be of brick, stone, iron or other substantial and incombustible material, and only the following wooden buildings shall be allowed to be erected, except as hereinafter provided, viz.: Sheds to facilitate the erection of authorized buildings, coal sheds not exceeding ten feet in height, and not to exceed one hundred feet in area, and privies not to exceed thirty feet in area and ten feet in height, and all such sheds and privies shall be separate structures: *Provided*, That any person desiring to erect a building of other material than those above specified within said fire limits, shall first apply to the committee on building within said fire limits of the city for permission so to do, and if the consent of the committee on building within said fire limits shall be given, they shall issue a permit, and it shall thereupon be lawful to erect such building under such regulations and restrictions as the committee on building within said fire limits may provide.

SEC. 3. Any wooden building already within said fire limits shall only be altered or repaired in such a manner that neither area nor height be in-

The evidence showed that the plaintiff in error was the owner of a wooden building of the dimensions of twenty by sixteen feet, which was used as a dwelling house. It was constructed prior to the enactment of the ordinances above mentioned. The evidence further showed that plaintiff in error applied to the mayor for permission to move the building along and across Main street in the city, to another place within the fire limits. The mayor refused the permission, stating that if the desire was to move it outside of the fire limits permission would be granted. Notwithstanding the refusal, the plaintiff in error moved the building, using blocks and tackle and rollers, and in doing so occupied the time between eleven A.M. and three P.M. At the place where the building stood originally the street was fifty feet from the houses on one side to those on the other — part of the space being occupied by sidewalks, and the balance by the travelled highway. The distance of removal was two hundred and six feet long and across Main street. Eureka City was and is a mining town, and had and has a population of about two thousand. It was admitted that the building was moved with reasonable diligence.

The plaintiff in error was again convicted. From the judg-

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creased without the consent of the said committee on building within said fire limits.

SEC. 4. The said committee on building within said fire limits shall have the power to stop the construction of any building, or the making of alterations or repairs on any building where the same is being done in violation of the provisions of this ordinance, and any owner, architect or builder, or others who may be employed, who shall assist in violation of non-compliance with the provisions of this ordinance shall be subject to a fine for every such violation or non-compliance, of not less than ten nor more than one hundred dollars.

SEC. 5. That there shall be a committee consisting of three members of the council appointed by the mayor and confirmed by the council, to be known as the "committee on building within the fire limits of Eureka City," and that said committee be appointed immediately upon the taking effect of this ordinance.

SEC. 6. This ordinance shall take effect and be in force from and after its first publication in the Tintic Miner.

Passed and approved June 4, 1894.

ment of conviction he appealed to the Supreme Court of the State, which court affirmed the judgment, and to the judgment of affirmance this writ of error is directed.

Eureka City has no special charter, but was incorporated under the general incorporation act of March 8, 1888, and among the powers conferred by it on city councils are the following:

"10. To regulate the use of streets, alleys, avenues, sidewalks, crosswalks, parks and public grounds.

"11. To prevent and remove obstructions and encroachments upon the same."

The error assigned is that the ordinance is repugnant to the Fourteenth Amendment of the Constitution of the United States, because "thereby the citizen is deprived of his property without due process of law," and "the citizen is thereby denied the equal protection of the law."

Mr. J. W. N. Whitecotton for plaintiff in error.

Mr. P. L. Williams for defendant in error.

Mr. Justice McKenna, after stating the case, delivered the opinion of the court.

Whether the provisions of the charter enabled the council to delegate any power to the mayor is not within our competency to decide. That is necessarily a state question, and we are confined to a consideration of whether the power conferred does or does not violate the Constitution of the United States.

It is contended that it does, because the ordinance commits the rights of the plaintiff in error to the unrestrained discretion of a single individual, and thereby, it is claimed, removes them from the domain of law. To support the contention the following cases are cited: *Matter of Frazee*, 63 Michigan, 396; *State ex rel. Garrabad* v. *Dering*, 84 Wisconsin, 585; *Anderson* v. *Wellington*, 40 Kansas, 173; *Baltimore* v. *Radecke*, 49 Maryland, 217; *Chicago* v. *Trotter*, 136 Illinois, 430.

With the exception of *Baltimore* v. *Radecke*, these cases passed on the validity of city ordinances prohibiting persons parading streets with banners, musical instruments, etc., without first obtaining permission of the mayor or common council or police department. Funeral and military processions were excepted, although in some respects they were subjected to regulation. This discrimination was made the basis of the decision in *State ex rel. Garrabad* v. *Dering*, but the other cases seem to have proceeded upon the principle that the right of persons to assemble and parade was a well-established and inherent right, which could be regulated but not prohibited or made dependent upon any officer or officers, and that its regulation must be by well-defined conditions.

This view has not been entertained by other courts or has not been extended to other instances of administration. The cases were reviewed by Mr. Justice McFarland of the Supreme Court of California in *In re Flaherty*, 105 California, 558, in which an ordinance which prohibited the beating of drums on the streets of one of the towns of that State "without special permit in writing so to do first had and obtained from the president of the board of trustees," was passed on and sustained. Summarizing the cases the learned justice said:

"Statutes and ordinances have been sustained prohibiting awnings without the consent of the mayor and aldermen (*Pedrick* v. *Bailey*, 12 Gray, 161); forbidding orations, harangues, etc., in a park without the prior consent of the park commissioners (*Commonwealth* v. *Abrahams*, 156 Mass. 57), or upon the common or other grounds, except by the permission of the city government and committee (*Commonwealth* v. *Davis*, 140 Mass. 485); 'beating any drum or tambourine, or making any noise with any instrument for any purpose whatever, without written permission of the president of the village,' on any street or sidewalk (*Vance* v. *Hadfield*, 22 N. Y. 858, 1003; 4 N. Y. Supp. 112); giving the right to manufacturers and others to ring bells and blow whistles in such manner and at such hours as the board of aldermen or selectmen may in writing designate (*Sawyer* v. *Davis*, 136 Mass.

239; 49 Amer. Rep. 27); prohibiting the erecting or repairing of a wooden building without the permission of the board of aldermen (*Hine* v. *The City of New Haven*, 40 Conn. 478); authorizing harbor masters to station vessels and to assign to each its place (*Vanderbilt* v. *Adams*, 7 Cow. 349); forbidding the occupancy of a place on the street for a stand without the permission of the clerk of Faneuil Hall Market (*Nightingale, petitioner*, 11 Pick. 168); forbidding the keeping of swine without a permit in writing from the board of health (*Quincy* v. *Kennard*, 151 Mass. 563); forbidding the erection of any kind of a building without a permit from the commissioners of the town through their clerk (*Commissioners &c.* v. *Covey*, 74 Md. 262); forbidding any person from remaining within the limits of the market more than twenty minutes unless permitted so to do by the superintendent or his deputy (*Commonwealth* v. *Brooks*, 109 Mass. 355)."

In all of these cases the discretion upon which the right depended was not that of a single individual. It was not in all of the cases cited by plaintiff in error, nor was their principle based on that. It was based on the necessity of the regulation of rights by uniform and general laws — a necessity which is no better observed by a discretion in a board of aldermen or council of a city than in a mayor, and the cases, therefore, are authority against the contention of plaintiff in error. Besides, it is opposed by *Davis* v. *Massachusetts*, 167 U. S. 43.

Davis was convicted of violating an ordinance of the city of Boston by making a public address on the "Common," without obtaining a permit from the mayor. The conviction was sustained by the Supreme Judicial Court of the Commonwealth, 162 Mass. 510, and then brought here for review.

The ordinance was objected to, as that in the case at bar is objected to, because it was "in conflict with the Constitution of the United States, and the first section of the Fourteenth Amendment thereof." The ordinance was sustained.

It follows from these views that the judgment of the Supreme Court of Utah should be and it is

Affirmed.